Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

MATTHEW G. BROWN,
Petitioner,

v.

SPECTACOR MANAGEMENT GROUP,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a plaintiff files an action in federal court based on diversity jurisdiction and the plaintiff's claim is for less than the jurisdictional amount in controversy, and the defendant objects to subject matter jurisdiction in his answer to the complaint and by way of a subsequent motion, can the plaintiff's jurisdictionally deficient complaint be "saved" or "rescued" by a compulsory counterclaim filed by the defendant that itself seeks damages that exceed the jurisdictional amount in controversy?

2. Where a plaintiff files an action in federal court based on diversity jurisdiction and the plaintiff's complaint does not in good faith satisfy the amount in controversy requirement, and the defendant objects to jurisdiction in his answer pursuant to Fed.R.Civ.P. 12(b) and subsequently in a motion filed under Fed.R.Civ.P. 11, and the district court fails to decide the jurisdictional issue raised by the defendant, is the court of appeals permitted to find that the defendant's compulsory counterclaim which, standing alone, seeks damages that exceed the jurisdictional amount in controversy, is adequate to confer jurisdiction over the entire proceeding?

3. Where a plaintiff files an action in federal court based on diversity jurisdiction, and the record reveals that the plaintiff manufactured a claim for more than the jurisdictional amount in controversy in order to get into federal court, is the defendant required to file a motion to dismiss the complaint under Fed.R.Civ.P. 12(b) in order to have the plaintiff's complaint dismissed for lack of jurisdiction, or to have the action dismissed is it sufficient for the defendant to object to jurisdiction in his answer pursuant to Rule 12(b) and file, alternatively, a compulsory counterclaim which would be pursued in the event the jurisdictional objection is overruled?

4. Where Fed.R.Civ.P. 12(b) expressly gives a defendant in a federal court proceeding the option of objecting to diversity jurisdiction either in his answer or by way of a motion to dismiss, and a defendant elects to object to jurisdiction in his answer and to not file a motion to dismiss, and the court fails to rule on the jurisdictional objection, can the defendant be found to have consented to jurisdiction, or to have waived his jurisdictional objection by filing, with the answer, a compulsory counterclaim which seeks damages that exceed the jurisdictional amount in controversy?

5. Where a plaintiff files an action in federal court based on diversity jurisdiction and it is undisputed that the plaintiff's claim for damages does not satisfy the amount in controversy for diversity jurisdiction, and the defendant objects to jurisdiction in his answer to the complaint and in a subsequent motion, and the district court fails to decide the defendant's jurisdictional objection, should the case be remanded to the district court to consider the jurisdictional issue?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed are the same parties appearing before this Court. Petitioner is Matthew G. Brown, defendant-appellant in the court below, and Respondent is Spectacor Management Group, plaintiff-appellee in the court below.

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ORDERS AND OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of Pennsylvania, dated September 27, 1996, is reproduced in Petitioner's appendix at pages A32-63. The final judgment of the United States District Court for the Eastern District of Pennsylvania, entered on October 15, 1996, is reproduced in the appendix at pages A31-32. The opinion of the United States Court of Appeals for the Third Circuit filed on November 24, 1997 is reproduced in the appendix at pages A5-30. The judgment of the United States Court of Appeals for the Third Circuit dated November 24, 1997, which affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania, is reproduced in the appendix at pages A3-4 The order of the United States Court of Appeals for the Third Circuit dated December 16, 1997, denying Petitioner's petition for rehearing, is reproduced in the appendix at pages A1-2. There are no official citations to any of these orders or opinions.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit which is sought to be reviewed was entered on November 24, 1997 (A 3-4).[1] Petitioner filed a timely petition for rehearing with the Third Circuit on December 8, 1997. On December 16, 1997, the Third Circuit entered an order denying the petition for rehearing (A 1-2). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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[1] References to the appendix hereto shall be cited as "A ___", with the page numbers following the designation "A".

STATEMENT OF THE CASE

Overview

This is a case where Respondent, Spectacor Management Group ("Spectacor"), received notice that it would be sued by Petitioner, Matthew G. Brown ("Brown"), its former employee, in a state court action which Spectacor knew could not be removed to federal court. Preferring to be in federal court, Spectacor raced to the federal courthouse and filed a sham diversity action against Brown in which it made itself the plaintiff. Spectacor's complaint did not satisfy the "good faith" test for the jurisdictional amount in controversy, and Brown objected to federal jurisdiction in his answer to the complaint. Brown also filed, simultaneously with his answer, a compulsory counterclaim against Spectacor pursuant to Fed.R.Civ.P. 13. After the parties had engaged in discovery, Brown filed a motion for sanctions against Spectacor under Fed.R.Civ.P. 11 in which he showed additional reasons why there never was federal jurisdiction, and sought dismissal of the action. The district court denied Brown's Rule 11 motion, and the case proceeded to trial.

The district court never decided the jurisdictional question, even though it was raised by Brown in his answer and again in the Rule 11 motion. Following a bench trial, the district court entered judgment in favor of Brown, but in an amount that was substantially less than the amount of his counterclaim. On appeal to the Third Circuit, Brown again raised the jurisdictional issue, arguing that the district court did not have subject matter jurisdiction, and therefore, that the case should be remanded to state court for further proceedings.

The Third Circuit, in a split decision which focused solely on the jurisdictional issue, departed from the

controlling authority of this Court as well as the decisions of other courts of appeal when it ruled that because Brown filed a compulsory counterclaim against Spectacor that sought damages in excess of the $50,000 jurisdictional limit, and elected not to file a motion to dismiss under Fed.R.Civ.P. 12(b), Brown's counterclaim in effect "rescued" what might otherwise have been a jurisdictionally deficient complaint filed by Spectacor. The Third Circuit issued this ruling even though Brown unquestionably complied with Rule 12(b) by objecting to jurisdiction in his answer to Spectacor's complaint; Rule 12(b) by its very terms gave Brown "the option" of asserting the defense of lack of subject matter jurisdiction *either* in his answer *or* by way of a motion to dismiss. In either case, the district court was obliged to consider the jurisdictional challenge under Fed.R.Civ.P. 12(h)(3). Brown chose the former option, and filed an answer challenging jurisdiction as well as a compulsory counterclaim which he intended to pursue only if the jurisdictional objection was overruled.

The Third Circuit panel majority's holding overlooked or misapprehended the well-settled authority of this Court which stands for the proposition that federal jurisdiction is to be determined solely from the "good faith" allegations of the *plaintiff's complaint*. In this case, Brown proved to a legal certainty that Spectacor's complaint against him, at the time it was filed, did not satisfy the amount in controversy requirement for diversity jurisdiction. Indeed, Spectacor conceded during the case that when it filed its action against Brown, it had no claim against him for *any* damages, let alone a claim that surpassed the jurisdictional threshold of $50,000. Nevertheless, the Third Circuit concluded that the filing by Brown of a counterclaim that, in itself, sought damages that exceeded the $50,000 jurisdictional limit was sufficient to confer federal jurisdiction over the entire proceeding, regardless of whether Spectacor's complaint was

a contrivance designed to force the entire litigation in federal court. As it will be shown, the Third Circuit's ruling is at odds with the controlling authority of this Court as well as the Federal Rules of Civil Procedure. The Third Circuit suggested that if Brown had filed a motion to dismiss under Fed.R.Civ.P. 12(b) rather than objecting to jurisdiction in his answer, the result would have been different – even if the district court denied the motion to dismiss, in which case Brown would have been required to file his counterclaim anyway.

The Third Circuit dissent would have held that even where a compulsory counterclaim, standing alone, exceeds the jurisdictional amount in controversy, it cannot "save" a plaintiff's complaint which, standing alone, does not in good faith assert a claim for damages that exceeds the amount in controversy. The dissent reasoned that under the controlling authority, the presence or absence of diversity jurisdiction is to be determined from the standpoint of the *plaintiff's complaint* (particularly where as here the defendant challenges subject matter jurisdiction in his answer), and that since there was "a serious question" as to whether Spectacor had a good faith basis for bringing an action against Brown in federal court and the district court had never decided the jurisdictional issue, the appropriate remedy was to remand the case to the district court "for a thorough consideration of the jurisdictional issue".

Procedural History and Summary of the Proceedings Below

On October 1, 1993, Spectacor initiated what purported to be a diversity action against Brown, to recoup severance payments and medical benefits it had allegedly "advanced" to Brown (A 64-67). At the time the case was filed, federal courts had jurisdiction where there was

complete diversity among the parties and the amount in controversy exceeded $50,000, exclusive of costs and interest. *See*, 28 U.S.C. § 1332(a).[2] Spectacor alleged in its complaint that it had "advanced" $42,501 in severance pay and $4,921 in medical benefits to Brown (A 65-66). These sums, when added together, amounted to only $47,422 (A 65-66). In order to reach the jurisdictional threshold of more than $50,000, Spectacor pleaded further in its complaint that it "incurred payroll tax liabilities on the salary advances totaling at least $3,287.21" (A 66).

Brown knew that Spectacor's complaint did not satisfy the amount in controversy requirement because Spectacor was not entitled to recoup these "payroll tax liabilities" *from Brown*. Since these "payroll tax liabilities" were nothing more than normal payroll tax obligations imposed on employers, they were not paid *to* Brown or for his benefit, and assuming *arguendo* that Spectacor had a valid claim to recover them, its sole remedy would have been to make a claim for a refund *to the IRS*. *See*, 26 CFR Ch.1 (4/1/96), Internal Revenue Service, §§ 31.3111-4, 31.3604(a)(2), 301.6404-2. Accordingly, it was obvious that Spectacor included these "payroll tax liabilities"in its complaint as an element of damages as a contrivance to clear the jurisdictional hurdle, and get into federal court.

Brown filed a timely answer to Spectacor's complaint in which he repeatedly challenged the district court's subject matter jurisdiction (A 68-74). *See*, Fed.R.Civ.P. 12(b) (defendant may raise lack of subject matter jurisdiction *either* in his answer *or* by way of a motion to dismiss). For example, in his answer, Brown averred that "[t]he Court

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[2] The amount in controversy for diversity jurisdiction has since been increased to $75,000.

lacks jurisdiction over the subject matter in that the amount in controversy does not exceed $50,000" and that "the items alleged by [Spectacor] to reach the $50,000 threshold are not compensable damages" (A 68, 72). Brown's answer specifically denied that the payroll tax liability was a compensable item of damages to Spectacor, and it alleged also that Spectacor's complaint "was filed in bad faith to harass [Brown] after [he] put [Spectacor] on notice that he intended to sue it..." (A 71, 74). Contemporaneously with the filing of his answer, Brown filed a compulsory counterclaim against Spectacor pursuant to Fed.R.Civ.P. 13, in which he sought damages for breach of contract in excess of $1,000,000 (A 74-77). The compulsory counterclaim was filed to preserve Brown's claims against Spectacor in the event the district court overruled his jurisdictional objection.[3]

After discovery was undertaken, the record revealed that not only was Spectacor's allegation with respect to the "payroll tax liability" a sham devised to overcome the $50,000 federal jurisdictional hurdle, but more significant, that Spectacor's *entire* claim against Brown – including its claim for recoupment of the $47,422 in severance pay and medical benefits – was a contrivance manufactured by Spectacor for the sole ulterior purpose of having *Brown's* large claim against *Spectacor* – which Spectacor knew Brown was about to file in *state court* – litigated in *federal court*

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Brown could have, but elected not to file a motion to dismiss for lack of jurisdiction under Fed.R.Civ.P. 12(b). By challenging jurisdiction in his answer, Brown followed Rule 12(b), which gave him the option to assert this defense in his answer, and he expected that the district court would rule on his objection, as it was obliged to. *See*, Fed.R.Civ.P.12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"). However, as the Third Circuit dissent noted, the district court never decided the jurisdictional question.

(with Brown as a *counterclaimant*), where Spectacor admitted it wanted to be. This revelation came to light when Brown filed a motion for summary judgment on his counterclaim in which he demonstrated that there was no dispute that Spectacor owed him a bonus of $50,000 as well as $15,692 in vacation pay (A 82,88-93). In its response to Brown's motion for summary judgment, Spectacor, in an effort to defeat the motion, admitted that well before it had sued Brown in federal court to recover $50,708 in damages (including the payroll taxes), it had paid *itself* the same $50,708 from the $50,000 bonus and $15,692 in accrued vacation pay it acknowledged owing Brown (A 95-101). In other words, Spectacor admitted to knowing before it sued Brown that it was holding $65,692 of Brown's money, and it acknowledged using that money to pay *itself*, as a "set-off" against the $50,708 it later sought to recover from Brown in the sham complaint it filed against him (A 99-101). Accordingly, Spectacor's answer to Brown's summary judgment motion effectively conceded that at the time it sued Brown, it knew it had *no claim* against Brown for *any* damages, let alone a claim for more than $50,000. Indeed, at the time Spectacor's complaint was filed and under its own theory, *it* owed *Brown* almost $15,000 (since Brown's money that Spectacor had taken as a "set off" exceeded the amount it later sued Brown for by about $15,000).[4]

As a result of Spectacor's telling admission that it had manufactured diversity jurisdiction by alleging a supposed debt it knew was already paid by Brown, on August 26, 1994 – more than two years before trial – Brown filed a motion for

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[4] The panel majority of the Third Circuit correctly noted that "Spectacor maintained that it retained the money that it owed Brown as a set off against payments it had made to Brown that he was obligated to repay" (A 8).

sanctions under Fed.R.Civ.P. 11 (A 102-145). In that motion, Brown offered irrefutable evidence of Spectacor's bad faith invocation of federal jurisdiction (A 118-136, 138-145). Significantly, in its response to Brown's Rule 11 motion, Spectacor did not (and could not) dispute that it believed at the time it sued Brown in federal court for $50,708 in damages that Brown actually owed it nothing (A 146-153). Spectacor even acknowledged that it had a motive for manufacturing federal jurisdiction and a claim for damages against Brown for more than $50,000, when it openly revealed in its answer to Brown's Rule 11 motion that it had sued Brown in *federal court* only because Brown had put it on notice that he was about to sue it in *state court* for the same damages Brown later sought against Spectacor in his compulsory counterclaim filed in the federal court action (A 148-150). In a remarkable display of candor, Spectacor admitted further in its response answer to the Rule 11 motion that it had chosen *federal court* as the forum for bringing its preemptive strike suit against Brown because it believed Brown would have a better chance of winning in *state court*, and that it knew if Brown sued it first, in *state court*, it would not have been able to remove the case to *federal court* under 28 U.S.C.§ 1441(b) because Brown was a citizen of Pennsylvania (A 151-153).[5]

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[5] In its opposition to Brown's Rule 11 motion, Spectacor specifically acknowledged that: "the Philadelphia Court of Common Pleas is a more favorable forum for an employee in a financial dispute with his employer;" it "would prefer to be in [federal court]; and it was aware when it filed its complaint against Brown in federal court that if Brown had "sued first in state court, [Spectacor], as a resident defendant, would not have been able to remove the case despite diversity of citizenship..." (A 153).

As a remedy for Spectacor's Rule 11 violation, Brown sought *dismissal* of Spectacor's complaint *for lack of subject matter jurisdiction* (A 103, 105, 116-118, 125-126, 129-130). Time and time again in his Rule 11 motion, Brown brought to the district court's attention the fact that it did *not* have subject matter jurisdiction because Spectacor admitted to believing at the time it sued Brown that it had no claim against him *at all*, let alone a claim that exceeded $50,000 (A 103, 105, 116-118, 125-126, 129-130).[6]

Nevertheless, on February 14, 1995, the district court entered an order denying Brown's Rule 11 motion (A 154-155). The district court ruled, without elaboration, that Spectacor did not file the action "solely to harass" Brown, but it did acknowledge that Spectacor brought the case in federal court "in order to obtain what it perceive[d] to be the more amenable forum" (A 155). The district court, however, did *not* decide the question of whether it had subject matter jurisdiction, even though Brown objected to jurisdiction in his answer and again in the Rule 11 motion (A 154-155).

The issue of federal jurisdiction surfaced again at trial when Spectacor's counsel stipulated that before Spectacor filed its complaint, it had paid itself the entire amount it later claimed against Brown in its complaint and that, in fact, at the time the complaint had been filed, Spectacor actually owed Brown the difference between the set-off amount Spectacor

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6 For example, Brown argued in his Rule 11 motion that Spectacor "manufactured a $50,000.00 claim in order to sue Brown in Federal Court", that "any reasonable pre-filing investigation by counsel would have revealed that there was no federal jurisdiction", and that "when [Spectacor] sued Brown, it and its counsel must have believed that [Spectacor] had no claim against Brown, or if it did have a claim, its value was nowhere close to $50,000.00" (A 125, 130).

took and Brown's funds that it had retained (A 156-158). The district court, however, continued to ignore the jurisdictional issue and the trial proceeded to its conclusion. Significantly, the district court awarded Brown the difference between what Spectacor admittedly *owed* him and the amount Spectacor had claimed *from* him in its complaint (A 46-47 60-63). This ruling simply confirmed what Brown had alleged all along, *i.e.*, that Spectacor's complaint was nothing more than a sham designed to create federal jurisdiction.

On appeal to the Third Circuit, Brown again raised the jurisdictional issue, contending that since the district court lacked subject matter jurisdiction, he should be given the right to re-file his counterclaim as a complaint in Pennsylvania state court, pursuant to 42 Pa.C.S.A. §5103. That statute provides, in relevant part, that "if a matter is originally filed within the statute of limitations in the federal court, but is dismissed for lack of jurisdiction by the federal court, the litigant may then effect a transfer of the action to state court...[and] the state court will treat the matter as if originally filed in the state court..." *See also*, 28 U.S.C. §1367(d).

The Third Circuit's opinion was devoted entirely to the jurisdictional issue. The panel majority correctly noted that Brown's challenge to subject matter jurisdiction was twofold, in that he "claimed that Spectacor manipulated the payroll tax claim as a contrivance to manufacture the amount in controversy needed for diversity jurisdiction and that Spectacor owed him more than he owed it" (A 8). However, the Third Circuit majority affirmed the judgment of the district court, finding that it did have subject matter jurisdiction. In a marked departure from the well-settled authority of this Court and the reasoned decisions of other courts of appeal, not to mention the clear language of Fed.R.Civ.P. 12, the Third Circuit held that:

> [W]here, as here, a defendant elects not to file a motion to dismiss for lack of jurisdiction, but answers a complaint by asserting a compulsory counterclaim, the amount of that counterclaim may be considered by the court in determining if the amount in controversy exceeds the statutory requirement for diversity jurisdiction.

(A 8-9). Hence, although Brown objected timely to subject matter jurisdiction in his answer to the complaint and sought dismissal of the complaint for lack of jurisdiction in his subsequent Rule 11 motion (filed after he learned of the "set-off" Spectacor helped itself to), the Third Circuit ruled that since Brown's compulsory counterclaim itself sought damages that exceeded $50,000, the counterclaim in effect "rescued" Spectacor's complaint from jurisdictional attack (A 8-9). Since the Third Circuit focused only on the counterclaim, it said it did not have to reach the "issue of whether the payroll taxes can be considered in calculating the amount in controversy" (A 9). Presumably for the same reason, the Third Circuit also did not decide the separate but related issue of whether Spectacor had no claim for any damages when it sued Brown (A 19). The panel majority suggested, however, that it would have found that jurisdiction was lacking had Brown filed a motion to dismiss the complaint under Fed.R.Civ.P. 12(b), rather than exercising his Rule 12(b) option of raising lack of jurisdiction in his answer and filing a simultaneous counterclaim (A 8-9, 19).[7]

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[7] Since Brown elected the option of filing an answer which challenged the district court's jurisdiction, he was required to file, simultaneously with his answer, his compulsory counterclaim.

In his dissenting opinion, Judge Wellford stated that even if a compulsory counterclaim, standing alone, exceeds the jurisdictional amount in controversy, it should not be permitted to "save" a plaintiff's complaint which does not in good faith assert a claim for damages that clears the jurisdictional threshold (A 24-30). Judge Wellford reasoned that under the controlling authority, the presence or absence of diversity jurisdiction is to be determined from the standpoint of *the plaintiff's complaint*, especially in a case such as this where the defendant-counterclaimant raises the defense of lack of jurisdiction in his answer (A 24-30). Judge Wellford noted that since there was "a serious question" as to whether Spectacor had a good faith basis for bringing an action against Brown in federal court, and the district court failed to decide the jurisdictional issue even though it was raised by Brown, the appropriate remedy was to remand the case to the district court "for a thorough consideration of the jurisdictional issue" (A 29-30).

REASONS FOR GRANTING THE WRIT

I. The Majority Opinion of the Third Circuit, Which Relates to an Important Federal Jurisdictional Question, Conflicts With Relevant Decisions of This Court

As the Third Circuit dissent noted, "[f]ederal courts are courts of limited jurisdiction... [which] should strictly construe jurisdictional requirements" (A 29). *See also*, *Page v. Schweiker*, 786 F.2d 150, 153 (3d Cir. 1986). In keeping with this well-settled principle, this Court in the landmark case of *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938), established the general rule that whether the amount in controversy for diversity jurisdiction is satisfied is

to be determined from the good faith allegations of *the plaintiff's complaint*. *Id.* at 288. As this Court in *St. Paul* stated:

> [T]he sum claimed by *the plaintiff* controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal...But if, from the face of the pleadings, it is apparent, to a legal certainty, that *the plaintiff* cannot recover *the amount claimed* or if, from the proofs, the court is satisfied to a like certainty that *the plaintiff* never was entitled to recover *that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction*, the suit will be dismissed. (Emphasis added).

Id. at 288-89. *Accord, State Farm Mut Auto. Ins. Co. v. Powell*, 87 F.3d 93,96 (3d Cir. 1996). Furthermore, this Court in *St. Paul* declared that the plaintiff's good faith in choosing the federal forum is "open to challenge" either by resort to the face of the complaint or by the facts disclosed at trial, and that:

> [I]f from either source it is clear that [the plaintiff's] claim never could have amounted to the sum necessary to give jurisdiction, there is no injustice in dismissing the suit.

303 U.S. at 290.

In a more recent decision, this Court reaffirmed the validity of *St. Paul* when it ruled that a federal court's jurisdiction depends upon "the facts as they exist when the

complaint is filed". *Newman Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989). *Accord, Powell, supra*, 87 F.3d at 97 (jurisdiction must be assessed based upon "factual reality" at time of filing complaint). Accordingly, under the controlling authority of this Court, it was Spectacor's complaint against Brown – and not Brown's counterclaim – that should have controlled the jurisdictional issue.

To further illustrate this point, this Court has also ruled that if it appears that the plaintiff has magnified or misrepresented his claim for damages just to get into federal court, the case should be dismissed for lack of jurisdiction. *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540 (1903). In addition, this Court has established a rule (developed in the context of federal question jurisdiction) that a plaintiff may not create jurisdiction by anticipating defenses that a defendant might raise, but instead, must allege proper jurisdictional grounds in his complaint. *See, e.g., Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908); *Taylor v. Anderson*, 234 U.S. 74 (1914); *First National Bank of Canton, Pa. v. Williams*, 252 U.S. 504 (1920). For these reasons, and under the time-honored teachings of this Court in *St. Paul, supra*, a federal court should look *only* to the plaintiff's complaint -- not to a counterclaim -- to determine whether jurisdiction exists. This is commonly known as the "plaintiff-viewpoint rule", as adopted by this Court in *St. Paul*, "under which jurisdiction is determined on the basis of what *the plaintiff* claims". *Motorists Mutual Ins. Co. v. Simpson*, 404 F.2d 511, 514 (7th Cir. 1969) (emphasis added). *See also*, Wright, Miller and Cooper, *Federal Practice and Procedure*, Vol. 13 §3608, Vol. 14A §3702 (whether federal jurisdiction exists is determined at time of filing action, not after responsive pleading is filed, and party seeking to invoke federal jurisdiction, once challenged, "has the burden of proving its existence").

The Third Circuit majority's ruling in this case that the amount of Spectacor's claim against Brown (or even if Spectacor had no claim at all) is irrelevant simply because Brown asserted a compulsory counterclaim which sought damages in excess of $50,000, directly conflicts with the controlling authority of this Court. The Third Circuit majority's holding actually eviscerates the principle announced in *St. Paul* that the jurisdictional amount in controversy is to be determined *solely* from the allegations of *the plaintiff's complaint*, and that *those* allegations must satisfy a "good faith" test. Indeed, the Third Circuit majority's rule announced in this case is nothing short of a repudiation of *St. Paul* because under this new rule, the time-honored "good faith" test for filing a complaint is no longer to be applied to complaints filed in the Third Circuit. Rather, a party who knows it does not have a claim that satisfies the jurisdictional amount in controversy can nevertheless compel the litigation in federal court if, like Spectacor, it wants to force the *real* plaintiff (in this case Brown) into federal as opposed to state court, by filing a preemptive "strike suit". Furthermore, under the Third Circuit's new rule, which ignores the well-established precedent established by this Court, district courts in the Third Circuit will have subject matter jurisdiction over sham claims even where the defendant strictly follows Rule 12(b) by challenging jurisdiction in his answer. The Third Circuit has thus established a brand new, hypertechnical "counterclaimant-viewpoint" rule under which the plaintiff's allegations – even if made in bad faith or for the purpose of manufacturing federal jurisdiction – are irrelevant. Furthermore, in the Third Circuit, a plaintiff is now invited to make up or magnify a claim to create the appearance of diversity jurisdiction, and it can then avoid the imposition of Rule 11 sanctions and

dismissal of the complaint even when it is caught, and the defendant objects to jurisdiction.[8]

Because the Third Circuit has decided an important federal question – whether a compulsory counterclaim that exceeds the jurisdictional amount in controversy can "save" a complaint that does not in good faith satisfy the amount in controversy, even where the defendant has objected to jurisdiction – in a way that conflicts with relevant decisions of this Court, this petition should be granted.[9]

II. The Ruling of the Third Circuit in This Case is in Direct Contravention of the Federal Rules of Civil Procedure. As a Result, the Exercise of This Court's Supervisory Power is Called For

To review, the Third Circuit majority rested its ruling on the notion that where a defendant opts not to file a Rule 12(b) motion to dismiss raising lack of jurisdiction, but instead objects to jurisdiction in his answer and simultaneously files a compulsory counterclaim, the amount of the counterclaim may be considered in determining whether the amount in controversy exceeds the statutory

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The Third Circuit panel majority noted that Brown moved for sanctions under Rule 11 after Spectacor conceded it owed Brown more than he owed it. The court, however, stated that "that does not alter our analysis" (A 19).

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Both the Third Circuit majority and dissent found that this Court's decision in *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348 (1961), offers no precedential value for this issue (A 21-23, 29). The majority did not rely upon *Horton*, and the dissent noted that there was "no persuasive basis for considering *Horton* as authority in this case".

minimum – even where the plaintiff's claim is a sham or does not meet the "good faith" test for establishing diversity jurisdiction. This ruling not only conflicts with controlling precedent of this Court, but it ignores Fed.R.Civ.P. 12(b), which by its express terms gives a defendant "the option" of raising lack of subject matter jurisdiction *either* in the answer *or* in a motion to dismiss. *Accord, McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936); Wright Miller and Cooper, *Federal Practice and Procedure*, Vol. 14, §3706 ("Defendant can object to the court's jurisdiction over the original claim in the answer and plead the counterclaim in the alternative"). One reason why Brown did not file a motion to dismiss was that he did not become aware that Spectacor's entire claim was a sham until discovery was taken.

In any event, since Brown challenged jurisdiction in his answer, and thereby followed the provisions of Rule 12(b), it is immaterial that he chose not to file a motion to dismiss. The district court was still obliged to, but never did, address Brown's jurisdictional objection. As Fed.R.Civ.P. 12(h)(3) states:

> Whenever it appears *by suggestion of the parties or otherwise* that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. (Emphasis added).

Accordingly, the Third Circuit majority disregarded the Federal Rules of Civil Procedure when it concluded that the amount sought in a counterclaim "counts" toward the amount in controversy if the defendant objects to jurisdiction *in his answer*, but *not* when he files a motion to dismiss (even if such a motion is subsequently denied by the court). Brown should not have been punished for complying with Rule 12(b). Because he objected to subject matter jurisdiction in his answer, he should not have been found to have "waived"

his right to challenge jurisdiction -- especially since the district court never considered his jurisdictional challenge , as it was obliged to under Rule 12(h)(3).[10]

III. The Third Circuit's Decision Conflicts With the Decisions of Other Courts of Appeal on This Same Important Jurisdictional Issue

The cases from other circuits which the Third Circuit majority purported to rely upon in support of its ruling actually stand for a contrary proposition. Those cases established a general rule that where the defendant *objects* to federal jurisdiction *and* files a counterclaim that exceeds the amount in controversy, the counterclaim cannot "rescue" a complaint that does not in and of itself satisfy the amount in controversy, but where the defendant does *not* object to jurisdiction and files a counterclaim, the court can exercise jurisdiction even if the complaint does *not* meet the jurisdictional threshold. Since Brown *did* object to subject matter jurisdiction in his answer (and again in his Rule 11 motion), the Third Circuit's ruling that his counterclaim was sufficient to bring the entire case within the district court's jurisdiction even if Spectacor's complaint was jurisdictionally

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10 The Third Circuit majority's rationale for allowing the amount of Brown's counterclaim to count toward the amount in controversy is plainly illogical. What if Brown had filed a motion to dismiss under Rule 12(b) and the district court denied that motion? Brown would have then been forced to file his compulsory counterclaim anyway. Would the rule then be that the counterclaim would *not* count in determining whether jurisdiction exists? It is presumably for these reasons that the Third Circuit dissent disagreed with the majority view that "Brown should lose the jurisdictional argument because he did not file a motion to dismiss, when he objected to the court's jurisdiction affirmatively in his answer" (A 29).

deficient, is at odds and in direct conflict with the decisions of other courts of appeal. As a result, there is now an irreconcilable conflict among the circuit courts with regard to this important jurisdictional issue. For this reason as well, this petition should be granted.

A review of the cases cited by the Third Circuit underscores the existence of this conflict. In *Roberts Mining Co. v. Schrader*, 95 F.2d 522 (9th Cir. 1938), the plaintiff's complaint failed to allege *any* jurisdictional facts, and the defendant filed an answer and counterclaim *and never objected* to jurisdiction. *Id.* at 523-24. The counterclaim requested damages that exceeded the amount in controversy, and the Ninth Circuit determined that the district court had jurisdiction. Similarly, in *Fenton v. Freedman*, 748 F.2d 1358 (9th Cir. 1984), the Ninth Circuit, relying upon its earlier decision in *Roberts Mining*, found that a compulsory counterclaim that by itself exceeded the jurisdictional amount in controversy was adequate to bring the entire case within the district court's jurisdiction, even where the plaintiff's claim was undoubtedly for less than the jurisdictional amount. The basis for the Ninth Circuit's ruling was that the defendant *did not object* to the district court's jurisdiction at any time prior to filing an appeal. *Id.* at 1359. Although the Third Circuit majority in this case *purported* to rely upon *Roberts Mining* and *Fenton*, those cases are easily distinguishable and stand for the opposite proposition to the Third Circuit's rule for the simple reason that in this case, Brown *did* object to jurisdiction in his answer to the complaint, and again in his Rule 11 motion. Unlike the plaintiffs in *Roberts Mining* and *Fenton*, Brown followed the rules when he objected, in a timely manner, to jurisdiction. Under *Roberts Mining* and *Fenton*, Brown's timely objection to jurisdiction would have meant that his counterclaim would not have "counted" toward the amount in controversy.

The Third Circuit's decision in this case is also in conflict with the Seventh Circuit's decision in *Motorists Mutual Ins. Co. v. Simpson*, 404 F.2d 511 (7th Cir. 1969) - although the Third Circuit majority purported to rely upon *Simpson* as well. In *Simpson*, the court embraced the rule "under which jurisdiction is determined on the basis of what the plaintiff claims", and *not* on the basis of what is alleged in a compulsory counterclaim. *Id.* at 514. The *Simpson* court went on the hold, in language which cannot be reconciled with the Third Circuit's holding in this case:

> [W]e believe that a compulsory counterclaim should not be held to give rise to federal jurisdiction where the defendant-counterclaimant *has objected from the beginning to the federal court's assumption of jurisdiction over the plaintiff's main action on the ground that the amount in controversy in that action is insufficient* and additionally, after its jurisdictional objection is overruled, files a compulsory counterclaim even though the amount therein exceeds [the amount in controversy]. (Emphasis added).

Id. at 514.

The Seventh Circuit in *Simpson* stated that the corollary proposition also holds true, *i.e.*, where a defendant files a compulsory counterclaim for more than the requisite jurisdictional amount "without initial objection to federal court jurisdiction over a main action that lacks the requisite amount in controversy", it can reasonably be inferred that the defendant-counterclaimant has consented to jurisdiction. *Ibid.* The *Simpson* court noted, however, that in the case before it, "continuous objection to federal jurisdiction was made by the defendant". *Id* at 515. Under those circumstances, according

to *Simpson*, since the defendant did not originally choose the federal forum, the option should be *his* as to whether or not the action should be maintained in federal court. *Ibid.* Accordingly, the *Simpson* court concluded that it was without jurisdiction to proceed unless *the plaintiff's claim* exceeded the requisite jurisdictional amount. The Third Circuit's ruling in this case conflicts with *Simpson* because Brown, like the defendant-counterclaimant in *Simpson*, objected from the outset to federal jurisdiction on the ground that the plaintiff's complaint did not meet the amount in controversy requirement. Under the rationale of *Simpson*, the fact that Brown filed a compulsory counterclaim along with his challenge to jurisdiction should not have led to the conclusion that Brown consented to jurisdiction, or waived his objection to jurisdiction. To the contrary, under the rule set forth in *Simpson*, the Third Circuit should have looked *only* to Spectacor's complaint to determine if there was jurisdiction.[11]

Accordingly, this petition should be granted for the additional reason that the Third Circuit's majority's decision conflicts with decisions of the Seventh and Ninth Circuits on this important federal jurisdictional issue.

CONCLUSION

For all of the foregoing reasons, this petition should be granted.

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[11] In *Simpson*, the Seventh Circuit cited this Court's holding in *St. Paul, supra*, for "[t]he rule that the amount in controversy should be determined from the standpoint of the plaintiff..." 404 F.2d at 514 & n.3.

/S/_____

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Date: March 13, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1969

SPECTACOR MANAGEMENT GROUP,

v.

MATHEW G. BROWN,
Appellant.

SUR PETITION FOR REHEARING

Present: SLOVITER, CHIEF JUDGE,
STAPLETON, MANSMANN, GREENBERG,
SCIRICA, COWEN, NYGAARD, ALITO, ROTH,
LEWIS, McKEE, and RENDELL
Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/_____

Circuit Judge
Hon. Theodore A. McKee

DATED: December 16, 1997

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1969

SPECTACOR MANAGEMENT GROUP,

v.

MATTHEW G. BROWN,
Appellant.

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil No. 93-5246)

Present: Greenberg, McKee, Circuit Judges, and Wellford, Senior Circuit Judge*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on June 24, 1997.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District

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* Honorable Harry W. Wellford of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

Court entered October 15, 1996, be, and the same is hereby affirmed. Costs taxed against appellant. All of the above in accordance with the opinion of this Court.

Page 2
96-1969

ATTEST:

Clerk

Dated: November 24, 1997

Costs Taxed in Favor of Spectacor Management Group as follows:

Total for Brief	$124.00
Total	$124.00

Certified as a true copy and issued in lieu
of a formal mandate on December 24 1997

/S/_____
Chief Deputy Clerk,

U.S. Court of Appeals for the Third Circuit.

APPENDIX C

Filed November 24, 1997

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 96-1969

SPECTACOR MANAGEMENT GROUP

v.

MATTHEW G. BROWN,
Appellant.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 93-5246)

Argued
June 24, 1997

Before: GREENBERG, McKEE, *Circuit Judges,* and
WELLFORD, **Senior Circuit Judge*

(Filed November 24, 1997)

** The Honorable Harry W. Wellford of the United States Court of Appeals of the Sixth Circuit. Sitting by Designation.

Spectacor Management Group v. Matthew G. Brown
No. 96-1969

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OPINION OF THE COURT

McKEE. *Circuit Judge.*

Spectacor Management Group {"Spectacor"} initiated this diversity action as a result of a disagreement with a former senior level executive over severance pay and benefits. The defendant counterclaimed, alleging that Spectacor had breached an oral contract with him and owed him money as a result. Following a bench trial, the district court entered Judgment for the defendant but in an amount that was substantially less than the amount of his counterclaim. The defendant appeals. We will affirm the Judgment of the district court without further comment, as it is based upon that court's

assessment of the evidence, and find no clear error.[1] However, the jurisdictional issues raised by this appeal require us to discuss the district court's exercise of subject matter jurisdiction. Accordingly, we will discuss whether the amount in controversy requirement of 28 U.S.C.A. § 1332(a) has been satisfied.

I.

Spectacor, a Pennsylvania joint venture engaged In the business of managing public assembly facilities, such as stadiums, arenas, and convention centers, brought this diversity action in an attempt to recoup severance benefits paid to defendant Matthew Brown, a New Jersey citizen, following his termination as Executive Vice-President of Spectacor. Spectacor's complaint alleged that it paid Brown $42.500 in benefits and $4,921.04 for medical insurance. The resulting total ($47.421.04) was, therefore, less than the $50,000 minimum required for diversity jurisdiction when the suit was filed. Spectacor, however, also alleged that it was entitled to recoup an additional $3,287.21 it had paid in payroll taxes. This additional sum brought the amount that Spectacor claimed to $50,708.25 exclusive of costs and interest.

Brown argues that Spectacor included the amount of the payroll taxes as a "sham" to manufacture federal jurisdiction in a preemptive attempt to prevent him from suing Spectacor in state court. Brown further argues that Spectacor

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[1] See *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

conceded that even Spectacor's claim to recover benefits from Brown was a sham because Spectacor stipulated in the district court that it owed him $50,000 in benefits plus $15,692 in vacation pay. See Appellant's Br. at 5. Spectacor maintained that it retained the money that it owed Brown as a set off against payments it had made to Brown that he was obligated to repay. Thus, Brown's response to the suit was twofold. He claimed that Spectacor manipulated the payroll tax claim as a contrivance to manufacture the amount in controversy needed for diversity jurisdiction and that Spectacor owed him more than he owed it. However, rather than filing a motion to dismiss Spectacor's complaint for lack of jurisdiction in the district court under Fed. R. Civ. P. 12(b)(1). Brown filed an answer in which he denied jurisdiction, and counterclaimed against Spectacor for the amount Spectacor allegedly owed him for severance pay ($135.000), sales commissions ($837,000), an earned bonus ($70,720), unused vacation days and unreimbursed business expenses ($17,550).

Spectacor argues that it included payroll taxes in good faith and the jurisdictional amount therefore appears on the face of the complaint. Spectacor maintains that, in any event, Brown's counterclaim can be considered in calculating the amount in controversy. That counterclaim easily surpasses the $50.000 threshold needed for diversity jurisdiction. Brown counters by arguing that Spectacor's allegation of damages in the amount of $50.708.25 fails to satisfy the jurisdictional amount as the claim was not made in good faith and that his counterclaim cannot be considered in calculating the amount in controversy.

We hold that where, as here, a defendant elects not to

file a motion to dismiss for lack of jurisdiction, but answers a complaint by asserting a compulsory counterclaim,[2] the amount of that counterclaim may be considered by the court in determining if the amount in controversy exceeds the statutory requirement for diversity jurisdiction. Accordingly, since the amount in controversy easily clears the jurisdictional hurdle when Brown's counterclaims are included, we need not reach the novel and interesting issue of whether the payroll taxes can be considered in calculating the amount in controversy.

II.

Federal courts have diversity jurisdiction where there is complete diversity among the parties, and the amount In controversy meets the jurisdictional minimum. See 28 U.S.C. § 1332(a). At the time this case was filed that amount was $50,000.[3] As a general rule, that amount is determined from the good faith allegations appearing on the face of the complaint. See *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288 (1938). A complaint will be deemed to satisfy the required amount in controversy unless the defendant can show to a legal certainty that the plaintiff cannot recover that amount, *Id.* at 289.

In a cause instituted in the federal court the

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[2] We note that this case only presents the question of whether compulsory counterclaims can be considered. Our holding does not extend to permissive counterclaims.

[3] That amount has since been increased to $75.000.

> plaintiff chooses his forum. He knows or should know whether his claim is within the statutory requirement as to amount. His good faith in choosing the federal forum is open to challenge not only by resort to the face of his complaint, but by the facts disclosed at trial, and if from either source it is clear that his claim never could have amounted to the sum necessary to give jurisdiction there is no injustice in dismissing the suit.

Red Cab, 303 U.S. at 290. As noted above, Brown challenged the district court's jurisdiction by way of an averment in his answer. At ¶ 16 of his answer, under the section of the answer captioned "DEFENSES", Brown states: "[t]he Court lacks jurisdiction over the subject matter in that the amount in controversy does not exceed $50,000.00." See app. at 16. Under Rule 12 of the Federal Rules of Civil Procedure, Brown could have filed a motion to dismiss for lack of Jurisdiction and not filed an answer unless that motion was denied.

> Every defense, in law or fact, to a claim for relief In any pleading . . . shall be asserted In the responsive pleading thereto if one is required except that the following defenses may *at the option of the pleader* be made by motion: (1) lack of jurisdiction over the subject matter . . ."

Fed. R. Civ. P. 12(b) (emphasis added). Brown elected not to exercise that option. Instead, he asserted a counterclaim

against Spectacor based upon the same transactions that gave rise to Spectacor's suit against him.

Federal Rule of Civil Procedure 13 provides in part as follows:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction ....

Fed. R. Civ. P. 13. Brown's claim against Spectacor is a compulsory counterclaim within the scope of this Rule. Where the circumstances surrounding a plaintiff's claim require a defendant to assert a counterclaim under Rule 13(a), defendant's claim is part of the controversy set forth in the plaintiff's complaint. The complaint initiates the legal action, but it is not the totality of the controversy, it is merely the portion of the controversy for which plaintiff seeks relief. However, the substance of the controversy extends to any compulsory counterclaim brought under Rule 13(a).[4]

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[4] The same is not true of counterclaims brought under Rule 13(b) as 'permissive counterclaims' are simply 'any claim against an opposing party not arising out of the . . . occurrence that Is the subject matter of the opposing party's claim," Fed. R. Civ. P. 13(b). Thus, by definition, permissive counterclaims are not usually part of the controversy brought into court by plaintiff's

> [i]f the jurisdictional amount requirement serves any salutary function it is to measure the substantiality of the claim. We believe that the substantiality of the claim can best be gauged by reference to what is actually at stake In the litigation rather than by strict reference to plaintiff's claim for relief.

IA James Wm. Moore *et al. Moore's Federal Practice.* ¶0.167[8] 2d ed. 1091).

The allegations of the instant suit demonstrate the wisdom of that approach. Spectacor alleges that it continued to pay Brown his salary and medical insurance after he was terminated "as an advance against the overall settlement then being negotiated." It maintains that such payments were a 'demonstration of good faith and subject to reimbursement If agreement was not reached on all Issues' regarding the termination of his employment. (See app. at 10: Compl. ¶ 10.). Its suit is an attempt to recover those funds pursuant to the alleged agreement as settlement of the dispute was apparently never negotiated. Brown, on the other hand, asserts that Spectacor breached a contract in which it agreed to pay him certain amounts In the event that his employment

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complaint.

However, we do not today decide whether a permissive counterclaim could ever bear such a nexus to a plaintiff's claim as to allow a court to consider it in determining if the amount in controversy exceeded the jurisdictional amount. Resolution of that question must await a more appropriate case.

was terminated, and that he was entitled to certain other payments by virtue of his performance while still employed at Spectacor. He specifically alleges that '[Spectacor] has breached the Employment Contract by not paying Brown sums [Spectacor] promised to pay upon his termination," (See app. at 18; Answer ¶36), and "[Spectacor] has stopped Brown's medical insurance coverage, and it therefore owes him a yet to be liquidated sum for its replacement." (See app. at 19: Answer ¶ 37: see also app. at 19-20; Answer ¶¶38-43).

Other courts have held that a compulsory counterclaim can satisfy the jurisdictional amount even where the defendant has not objected to jurisdiction. See *Fenton v. Freedmart*, 748 F.2d 1358 {9th Cir. 1984} {considered counterclaim where defendant had not objected to jurisdiction prior to filing compulsory counterclaims}; *Roberts Mining & Milling Co. v. Schrader*, 95 F. 2d 522 {9th Cir. 1938} (considered counterclaim where defendant did not object to jurisdiction, but instead filed counterclaim in an amount adequate to support jurisdiction);[5] *Motorist Mutual Ins. Co. v. Simpson,*

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[5] We note that the *Roberts Mining* court did not explicitly hold that the counterclaim was compulsory. However. the initial claim by the plaintiff was to quiet title to six mines while the counterclaim asserted that the mines were owned by the defendant. Such a counterclaim would be considered compulsory under the modern Rule 13{a). The claim was also compulsory under the procedural rides that prevailed at the time. While the decision was handed down in 1938, the year that the federal courts of equity and law were unified into the modern system governed by the Federal Rules of Civil Procedure, the suit was filed prior to such unification and thus was one brought "in equity." 95 F.2d at 522. Such actions

404 F.2d 511 (7th Cir. 1968) (holding that compulsory counterclaim was not to be considered where defendant objected to jurisdiction before filing a counterclaim, but noting that if no objection had been made, consideration of compulsory counterclaim was permissible).[6]

Prior to the 1938 unification of the law and equity courts and the adoption of the Federal Rules of Civil Procedure, this court held that a counterclaim of sufficient value could bring a case within the jurisdiction of the court regardless of the amount of plaintiff's claim. See *Home Life*

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were governed by procedural rules that, unlike the rules governing actions at law, recognized compulsory counterclaims. See Equity Rule 30 ("The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit ....") *American Mills Co. v. American Surety Co.*, 260 U.S. 360, 365 (1922) (noting that, it is imperative to limit the preclusive effect of counterclaims to those which are equitable, as opposed to legal in nature): Michael D. Conway. *Narrowing of the Scope of Rule 13(a)*. 60 U. Chl. L. Rev. 141. 154 (1993) ("Prior to 1938, there was no rule requiring the pleading of compulsory counterclaims at law.") (citing *American Mills, supra*).

[6] Spectacor also points to *National Union Fire Ins. Co. of Pltisburgh v. Russell* 972 F.2d 628 (5th Cir. 1992), which held that where an insurer challenges an award under the Texas Worker's Compensation Act in federal court, the defendant's counterclaim could be considered for purposes of the jurisdictional amount. However, that case relies specifically on *Horton v. Liberty Mutual. Ins. Co.*, 367 U.S. 348 (1961). which dealt with the Texas Worker's Compensation Act and which, as discussed below, we do not, rely upon here. See n.9 infra.

Ins. Co. v. Sipp, 11 F.2d 474, 476 (3rd Cir. 1926).

In *Home Life,* Sipp was the beneficiary of a life Insurance policy that the defendant insurance company had Issued on her mother's life. Following her mother's death, Sipp sued to recover the amount of the policy ($3,000) plus interest and costs. At the time, a claim had to exceed $3,000 exclusive of interest and costs to satisfy the amount required for diversity jurisdiction. The insurance company filed a counterclaim for a loan on the policy that remained outstanding in the amount of $423. Sipp subsequently attempted to amend her claim to include premiums that were paid for the period following her mother's death. However, the court ruled that the amount of "unearned premiums" could not be included as "the premium is earned the instant the risk attaches and is not returnable thereafter." *Id.* at 475. Moreover, even if the premium could be recovered, that amount would go to the estate of the deceased, and not to the plaintiff beneficiary. Thus, the amount of the premium could not count toward the jurisdictional minimum. Moreover, the amount of the counterclaim could not be added to the $3,000 claim to satisfy jurisdiction because the counterclaim was in the nature of a set-off to be subtracted from, not added to, any recovery. Accordingly, the counterclaim served only to reduce the amount in controversy. However, in deciding the case we stated:

> when the jurisdictional amount is in question, the tendering of a counterclaim in an amount which in itself, or added to the amount claimed in the petition, makes up a sum equal to the amount necessary to the jurisdiction of this

> court, jurisdiction is established, whatever may be the state of the plaintiff's complaint.

Brown suggests that *Home Life* held that a counterclaim did not suffice to give a court jurisdiction where the plaintiff's initial claim could not. See Appellant's Sup. Br. at 6. He points out that we also stated: "[a] party . . . cannot by filing a counterclaim give jurisdiction to a court when a statute denies it jurisdiction. In other words, a defendant's consent to the court's jurisdiction as to amount, signified by the filing of the counterclaim cannot confer jurisdiction." *Home Life*, 11 F.2d at 476. However, that portion of the opinion merely rejects plaintiff's argument that defendant should be estopped from challenging jurisdiction once he or she pleads a counterclaim. It does not address the issue of whether the amount of the counterclaim is included in the amount in controversy for jurisdictional purposes.

We concluded that the jurisdictional prerequisites were not satisfied in *Home Life,* because the counterclaim reduced the amount that the "defendant admits it owes" and was not an independent claim for recovery. Accordingly, we stated [a]t no time and under no arrangement of the figures [had] the amount in controversy exceeded $3,000." *Id.* Although cases of such ancient vintage do not always guide subsequent Inquiries with precision {especially in view of the evolving nature of federal jurisdiction}, we think that our analysis in *Home Life,* along with similar holdings from our sister circuit courts of appeals, counsel us here. Cf. *Fenton,* 748 F.2d at 1359 {holding that the circuit was bound to follow prior 1938 precedent of *Roberts Mining,* which was considered a "suit in equity" and, like *Home Life,* was decided under procedural

law applicable before the federal system was unified}. Moreover, the discussion in *Home Life* remains viable under today's unified federal court system.

Other courts have noted practical reasons for counting compulsory counterclaims toward the jurisdictional amount. In *Roberts Mining*, the court reasoned that consideration of the counterclaim was permissible because the counterclaim was the equivalent of a second, independent suit in which the defendant of the initial action was the plaintiff, 95 F.2d at 59.4 {citing *Merchants' Heat & Light Co. v. James B. Clow & Sons*, 204 U.S. 286 (1907)}, and that the matter in controversy was the same in each of these suits, *Id.* Therefore, because the court would have jurisdiction over this second suit, the court saw no impediment to asserting jurisdiction over the entirety of the initial action, *Id.* This reasoning is echoed in more recent cases where courts have noted that where there is no objection to jurisdiction and where the counterclaim independently meets the required amount, one can assume that the defendant would have chosen the federal forum and there is no reason not to exert jurisdiction simply because the plaintiff won the race to the courthouse. *See Motorists Mutual Ins.*, 404 F.2d at 514-15.[7]

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[7] We realize that Brown is here arguing that he intended to sue in state court and that Spectacor raced into federal court as a preemptive strike to avail itself of a more favorable forum, see Appellant's Br. at 6. and therefore this presumption does not apply here. In the situation here, if Brown had sued in a Pennsylvania state court Spectacor, as a Pennsylvania citizen, would not have been able to remove the case to the district court. See 28 U.S.C. § 1441(b). Nevertheless, these policy implications are still relevant

Of course, we do not mean to suggest that parties can agree to the jurisdiction of a federal court and thereby confer jurisdiction that would not otherwise exist. That is clearly not the case. Federal jurisdiction arises under the constitution. It is not created by contract or waiver. In *Fenton, the* court stated:

> [e]ach of the . . . compulsory counterclaims exceeded $10,000. In *Roberts Mining & Milling Co. v. Schrader,* we stated that a counterclaim that exceeded the necessary amount in controversy was sufficient to bring the entire case within the jurisdiction of the district court, regardless of the lack of jurisdictional averments in the . . . complaint .... The [defendants here] did not object to the district court's exercise of jurisdiction prior to the filing of their compulsory counterclaim but, rather, raised the issue for the first time on appeal.

748 F.2d at 1358 (citations and internal quotation marks omitted). However, the court could not have intended to suggest that Jurisdiction can be waived. Rather, we conclude that the court was simply noting that the defendants there had done nothing to prevent the amount of their counterclaim from

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to our discussion. In noting them, we do not suggest that there is any merit to the belief of either party here that a federal or state forum will benefit either side.

becoming part of the controversy that was initiated by the plaintiff's suit, and that the counterclaim was therefore properly considered in determining the amount in controversy. Similarly, Brown did object to jurisdiction, but he did not do so in a manner that kept his counterclaim from being before the court. When a defendant elects that option afforded under Rule 12 and decides not to move to dismiss for lack of subject matter jurisdiction, but asserts a compulsory counterclaim against the plaintiff instead, the defendant thereby places the amount of the counterclaim into controversy, and the court must consider that amount in determining if it has jurisdiction under 28 U.S.C.A. §1332(a). This is true whether or not the defendant also attacks subject matter jurisdiction in his or her answer or in any other manner that does not prevent the counterclaim from being before the court.[8]

In arguing that we should not consider compulsory counterclaims, Brown also points *to Oliver v. Haas,* 777 F. Supp. 1040 {D.P.R. 1991}; *Michael F. Ronca & Sons, Inc. v. Monarch Water Systems,* 1990 WL 140154 (E.D. Pa. 1990): *P.S. Group v. Aladdin Engineering and Manufacturing, Inc.,* 1990 WL 122938 {E.D. Pa. 1990l; and *Cabe v. Pennwalt,* 372 F. Supp. 780 (W.D.N.C. 1974). See Appellant's Sup. Br. at 6. Each of these cases was decided in

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[8] Here in addition to a statement in his answer challenging Jurisdiction, Brown subsequently moved for sanctions under Fed. R. Civ. P. 11 when, in response to Brown's summary judgment motion. Spectacor conceded that it owed Brown more than he owed it. See Appellant's Br. at 6. However, that does not alter our analysis.

the context of removal and each holds that counterclaims cannot be considered when determining whether an action has been properly removed. Although there is authority to the contrary, *see. e.g., Swallow & Assoc. v. Henry Molded Products, Inc.*, 794 F. Supp. 660 {E.D. Mich. 1992) {holding that in the removal context 'substantiality of claim" should be gauged by considering the compulsory counterclaim the cases to which Brown points appear to represent the majority view that inclusion of counterclaims should not be permitted in the removal context. Wright. *supra,* at 124 (collecting cases}. However. removal is governed by considerations inapplicable to cases involving the exercise of original jurisdiction. In *Shamrock Oil Corp. v. Sheets*. 313 U.S. 100. 107-109 {1941), the Supreme Court noted that the legislative history and language of the removal statute shows that Congress intended to limit removal. The Court reasoned that removal was statutory and not constitutional. and that removal jurisdiction must therefore, be narrowly construed In favor of the non-removing party to prevent, *inter alia*, encroachment on the right of state courts to decide cases properly before them. The contrary consideration is present when we consider a court's exercise of original jurisdiction. Thus, in the abstention context, the Court has stated:

> [T]he federal courts have a virtually unflagging obligation to exercise their Jurisdiction except In those extraordinary circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.

Deakins v. Monaghan, 484 U.S. 193. 202 {1988) {internal

quotation marks omitted). Furthermore. "If compulsory counterclaims were considered for purposes of jurisdiction. federal subject matter jurisdiction would be reliant on state law distinctions between compulsory and permissive counterclaims." *Meridian Aviation Service v. Sun Jet Int'l* 886 F. Supp. 613, 615 (S.D.Tex. 1995). Accordingly, Brown's reliance upon cases addressing issues surrounding removal jurisdiction does not assist us.

Here, Brown submitted his compulsory counterclaim to the district court thereby putting the amount of that counterclaim in controversy. The amount of his counterclaim must be considered in determining whether the district court had subject matter jurisdiction. See also *Horton*, 367 U.S. 348 (1961).[9]

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[9] In *Horton* an insurance company filed suit in federal court, alleging diversity jurisdiction, to challenge a $1,050 award given by the Texas Industrial Accident Board pursuant to the Texas Workman's Compensation Act in its complaint the company also asserted that the defendant would assert a compulsory counterclaim that he was entitled to an award of $14,035. In response, the defendant filed a motion to dismiss for failure to satisfy the amount in controversy and filed an answer, subject to the motion to dismiss, containing the $14.035 conditional compulsory counterclaim just as plaintiff had predicted. Although the amount of the insurance company's claim clearly did not meet the amount in controversy minimum that was then an amount in excess of $10,000 the Supreme Court held that the jurisdictional requirement was met because of the $14,035 counterclaim.. The Court stated:

> The complaint of the respondent company filed in the District Court, while denying any liability at all

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and asking that the award of $1,050 against it be set aside, also alleges that petitioner Horton has claimed, now claims and will claim that he has suffered total and permanent disability and is entitled to a maximum recovery of $14,035, which, of course, is in excess of the $10,000 requisite to give a federal court jurisdiction or this controversy. No denial of these allegations in the complaint has been made, no attempted disclaimer or surrender of any part of the original claim has been made by petitioner, and there has been no other showing, let alone a showing 'to a legal certainty' of any lack of good faith on the part of the respondent in alleging that a $14.035 claim is in controversy. It would contradict the whole record as well as the allegations of the complaint to say that this dispute involves only $1,050. The claim before the [Texas Industrial Accident] Board was $14,035: the state court suit of petitioner asked that much: the conditional counterclaim in the federal court claims the same amount. Texas law under which this claim was created and has its being leaves the entire $14,035 claim open for adjudication in a de novo court trial regardless of the award. Thus the record before us shows beyond a doubt that the award is challenged by both parties and is binding on neither; that petitioner claims more than $10,000 from the respondent and the respondent denies it should have to pay petitioner anything at all no matter which party brings it into court, the controversy remains the same; it involves the same amount of money and is to be adjudicated and determined

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> under the same rules. Unquestionably, therefore, the amount in controversy is in excess of $10,000.367 U.S. at 353-54.

As the dissent noted. *Horton* can be read as holding that if a plaintiff asserts in the complaint that a counterclaim will be brought in an amount above the jurisdictional minimum, then the amount in controversy has been satisfied. Yet, that is clearly contrary to the well-established rule (developed in the context of federal question Jurisdiction that a plaintiff cannot create federal jurisdiction by anticipating federal defenses that a defendant may assert. See id. at 358-59 (citing *Skelly Oil* Co. v. Phillips Petroleum Co., 339 U.S. 667 11950}: First *National Bank of Canton Pa. v. Williams,* 252 U.S. 504 11920): Louisville & N.R. Co. v. *Mottley.* 211 U.S. 149 11908): Taylor v. *Anderson,* 234 U.S. 74 11914)).

Perhaps because *Horton* has so troubled commentators and courts, it has been conspicuously absent from discussions of the effect of counterclaims upon the amount In controversy. See. *e.g.*. *Fenton, 748* F. 2d 1358: Motorists *Mutual.* 404 F.2d 51 I. Only two reported cases outside The Texas Compensation Act context cite *Horton* In regard to the counterclaims and the jurisdictional amount. See Emland Builders. *Inc. v. Shes,* 359 F.2d 927 {lOth Clr. 1966): *Russell* 972 F.2d 628. In *Eraland Builders.* the court found *Horton* to be of dubious Instruction and held that. in any event, the complaint sufficed Io meet the Jurisdictional requirement.

Although the holding In *Horton* supports our analysis, we need not rely upon it for the decision we reach here. *(Horton has* been described as 'baffling" by respected legal commentators, see Wright. *supra* at 111. and we include It only for the sake of the thoroughness of our discussion).

III.

For the reasons set forth above, we will affirm the judgment of the district court.

WELLFORD, Senior Circuit Judge, dissenting:

I respectfully dissent from the decision in this case based on what I believe to be a serious question about lack of jurisdiction. Spectacor proceeded in the federal court in its chosen venue, asserting diversity jurisdiction and more than the required jurisdictional amount, but only barely, on the face of the complaint. The defendant Brown filed an answer affirmatively stating "[t]he Court lacks jurisdiction over the subject matter in that the amount of controversy does not exceed $50,000." He added, among other things:

> Plaintiff has failed to state a valid claim upon which relief can be granted.
>
> Plaintiff was already obligated to provide the sums and benefits to Defendant.
>
> Plaintiff's Complaint was filed in bad faith to harass Defendant.

Defendant contemporaneously filed a counterclaim, seeking a substantially greater amount than was requested in the original complaint.

The district court found that the action was not filed in

bad faith because "[s]ums owed by a plaintiff to the defendant are not subtracted from the amount of plaintiff's claim when calculating the jurisdictional amount. *Savarese v. Edrick Transfer & Storage. Inc.*, 513 F. 2d 140, 142 {9th Cir. 1975)." In my view, however, the facts of Savarese are materially different from those presented by the jurisdictional issue in this case. In that case, the plaintiff sought $11,901 from the defendant who did *not contest* the claim. Additionally, the plaintiff acknowledged that he held some $2,578 that belonged to the defendant, which he sought to apply against the debt owed him. The defendant conceded that the amount sought by Savarese was above the jurisdictional minimum amount.[1] The defendant did not challenge, in a timely fashion, jurisdiction in its responsive pleading.

In the instant case, even if Brown had not pleaded lack of jurisdiction, a challenge to subject matter jurisdiction is not waivable: and when a challenge is made, It must be fully considered. *United States ex rel Coffey v. Austin Construction.* 436 F. Supp. 626 {W.D. Okla. 1977}. Whether federal jurisdiction exists is determined as of the time the action is filed, not after the responsive pleading is filed. Wright, Miller and Cooper. *Federal Practice and Procedure.* Vol. 13B §3608. Vol. 14A §3702. The party seeking to invoke federal jurisdiction, once challenged, "has the burden

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[1] The *Savorese* court acknowledged that had plaintiff initially demanded a judgment of $9,323 (the difference after application of an offset, the district court would have lacked jurisdiction, citing *Kansas City Philharmonic Ass'n v. Greyhound* Lines, 257 F. Supp. 941 (W.D. Mo. 1966): C. Wright Federal Courts, 116-17 and n.52, 134 2d ed. 1970).

of proving its existence." *Id.*, § 3702.

In a suit for a sum certain that is less than the jurisdictional amount, adding a claim for punitive damages so that the jurisdictional amount may be exceeded may be insufficient to establish jurisdiction. *Wiggins v. N.A. Equitable Life Ins. Co., 644* F.2d 1014 {4th Cir. 1981}. Furthermore, "the extent to which a counterclaim can be considered In determining the amount In controversy never has been determined satisfactorily by the federal courts." Wright, Miller and Cooper, *Federal Practice and Procedure,* Vol. 14, §3706. "Defendant can object to the court's jurisdiction over the original claim In the answer and plead the counterclaim in the alternative." *Id.*, §3706.

Here, the district court acknowledged that Spectacor admitted "that it does not 'own' the set-off funds." but, rather than holding that that fact barred the claim, the court held that Spectacor took a "strategic action" to obtain what it perceives lo be a more amenable forum." Brown argued (I think plausibly) that Spectacor genuinely claimed only $47,421 in "salary advances and "medical insurance premiums" made for his benefit. Brown complained, however, about the asserted "payroll tax liabilities" of $3,287, arguing that this additional claim was a 'sham' to manufacture federal court jurisdiction.' The *district court never decided whether, in fact. the so-called -payroll tax liability' portion of the complaint,* which was necessary to exceed the jurisdictional amount of $50,000 *was something other than a "sham" or a "contrivance"* to establish federal jurisdiction. The district court merely held, without elaboration, that the suit was filed in good faith and not for the purpose of harassing the defendant.

The majority holds that because defendant did not file a motion to dismiss for lack of jurisdiction and asserted a compulsory counterclaim, that it would consider the amount of the counterclaim in determining the amount in controversy, citing *Fenton v. Freedman,* 748 F.2d 358 19th Cir. 1984). But. as the majority acknowledged, *Fenton* involved a situation where defendant had not first objected to jurisdiction. It is therefore distinguishable from this case, as is the earlier Ninth Circuit case, *Roberts Mining Co. v. Schrader,* 95 F.2d 529. (9th Cir. 1966), for the same reason.

The remaining case cited by the majority for this jurisdictional holding was *Motorists Mutual Ins. Co. v. Simpson,* 404 F. 2d 511 (7th Cir. 1969). That court held contrary to the majority's interpretation:

> When a claim over which there is otherwise jurisdiction does not embrace an amount In controversy in excess of that required by the statute, the "plaintiff-viewpoint" rule, under which jurisdiction is determined on the basis of what the plaintiff claims, requires dismissal of the claim. A problem arises, however, when although the plaintiff's claim does not involve the requisite jurisdictional amount, a compulsory counterclaim is filed which independently meets the required amount. There are cases which hold that In such a situation federal jurisdiction should be sustained.
>
> But irrespective of the holding in those

> cases, we believe that a compulsory counterclaim should not be held to give rise to federal jurisdiction where the defendant-counterclaimant has objected from the beginning to the federal court's assumption of jurisdiction over the plaintiff's main action on the ground that the amount !n controversy in that action is insufficient and additionally, after his jurisdictional objection is overruled, files a compulsory counterclaim even though the amount therein involved exceeds $10,000 exclusive of interest and costs.

Simpson, 404 F.2d at 514 emphasis added) (footnotes omitted).

The *Simpson* court, moreover, in the type of situation existing in this case, observed that "[s]ince, however, defendant did not originally choose the federal forum, the option should be his whether or not to keep the action in federal court," citing 1 J. Moore, *Federal Practice* § 0.98[1], at 896 (2d ed. 1964). Simpson held that It was without jurisdiction to proceed unless the original claim exceeded the jurisdictional amount. I would agree with this assessment, and I would question the authority of *Home Life Ins. Co. v. Sipp*. 11 F.2d 474 (3d Cir. 1926), to the extent that it indicates a contrary rule.[2]

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[2] I would agree that *Sipp* correctly held that neither unearned premiums nor a policy loan could be added to the then minimum jurisdictional amount requirement ($3.000 plus) involving

The majority properly concedes that there is a "well-established rule" that a plaintiff cannot create federal jurisdiction by anticipating federal defenses. Like the majority, I perceive no persuasive basis for considering *Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348 (1961), as authority in this case. The district court made no reference to any of these authorities except *Savarese*, which is easily distinguishable.

In my view, the determinative question as to adequacy of the jurisdictional amount asserted in the complaint has not been determined. Spectacor could have filed a declaratory judgment action to have avoided these problems, but it did not. It also could have sought removal from state court to federal court had Brown sued as he indicated he would. I disagree with the majority view that Brown should lose the jurisdictional argument because he did not file a motion to dismiss, when he objected to the court's jurisdiction affirmatively in his answer. Federal courts are courts of limited jurisdiction, and I believe we should strictly construe jurisdictional requirements.

The question of whether "payroll tax liability" is a proper claim against Brown is a novel one and I see no easy answer. Was this liability actually paid or incurred, or was it a mere bookkeeping entry? Did it constitute a part of the "advance" to Brown? Was Brown liable to repay that amount

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a $3,000 face amount life Insurance policy to establish federal jurisdiction: and (2) filing of the defendant's counterclaim could not confer jurisdiction.

to Spectacor, the IRS, or the State, if Spectacor had later deemed the salary to have been erroneously paid? In addition. I would call upon the district court to consider the "good faith" question in view of the circumstances and give an explanation for its the district court for a thorough consideration of the jurisdictional issue for the reasons stated.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPECTACOR MANAGEMENT GROUP

v.

MATTHEW G. BROWN

CIVIL ACTION
NO.93-5246

CIVIL JUDGMENT

Before the Honorable Robert S. Gawthrop, III

AND NOW, this 9th day of October, in accordance with **this Court's Opinion and Order* of September 27, 1996,**

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendant, Matthew G. Brown and against the plaintiff, Spectacor Management Group in the amount of $15,535.05.

*Copy of Opinion attached

BY THE COURT
/S/_____

Spectacor Management Group v. Matthew Brown
No. 93-5246

Deputy Clerk
Civ 1 (8/80), Dated: 10/15/96

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPECTACOR MANAGEMENT GROUP,
Plaintiff,

v.

MATTHEW G. BROWN,
Defendant/Counterclaimant.

CIVIL ACTION NO. 93-5246

OPINION

Gawthrop, J. September 27, 1996

Spectacor Management Group ("SMG") commenced this action to recover funds advanced to and on behalf of its former employee, Matthew G. Brown ("Brown"). Mr. Brown has counterclaimed for his 1992 bonus, his accrued vacation, business expenses, a severance package, and a sales commission. After a bench trial, and upon the following reasoning, I shall grant SMG's claim for the recoupment of funds. I shall grant Mr. Brown's counterclaims for his undisputed bonus, accrued vacation and business expenses, but deny his counterclaims for severance, a sales commission, and greater discretionary bonus.

Spectacor Management Group v. Matthew Brown
No. 93-5246

FINDINGS OF FACT

1. The plaintiff, SMG, is a Pennsylvania Joint Venture with its principal place of business in Philadelphia, Pennsylvania.

2. The defendant/counterclaimant, Mr. Brown, is an individual who, at the time this action was filed, was a resident of the State of New Jersey.

3. The amount in controversy exceeds $50,000, exclusive of interest and costs.

4. The cause of action arose in Philadelphia, Pennsylvania, within this judicial district.

5. SMG is in the business of managing public assembly facilities, such as stadiums, arenas, and convention centers, throughout the world.

6. At all times material to this case, SMG or its predecessor entities have been either partnerships or a joint venture, the ownership of which has evolved through the following sequence. From its inception until 1988, the entity which is now known as SMG existed as a partnership called Spectacor Management and was owned and controlled by several individuals and entities affiliated with Spectacor, Inc. and/or the Edward Snider family (the "Spectacor Group"). In 1988, Spectacor Management merged with a firm then known as FMG Associates (the "FMG merger"), owned and controlled by Pritzker & Pritzker (the "Pritzkers"), the Chicago-based family partnership that controls Hyatt Hotels,

to form SMG. In 1991, ARA Leisure Services, Inc., a subsidiary of The ARA Group, Inc., now known as Aramark ("ARA"), purchased a one-third interest in SMG, which was reorganized as a joint venture owned equally by the Spectacor Group, the Pritzkers and ARA.

7. At all times material to this case, SMG has been managed on a day-to-day basis by a chief executive officer and various subordinate officers appointed by and responsible to the board. The chief executive officers relevant to this case are: Antonio G. Tavares, who held the position of president from the inception of SMG through early 1992; Richard H. Vent, a member of the board who held the position of managing director from the time of Mr. Tavares' departure until the Fall of 1992; and Thomas R. Gibson, who held the position of president from the Fall of 1992 throughout the remainder of the events at issue.

8. Matthew G. Brown was hired by Spectacor Management in 1985 as General Manager of the Philadelphia Civic Center and, thereafter, held a series of increasingly responsible positions, including Senior Vice President for Operations, beginning in May, 1989, and Executive Vice President, beginning in early 1992. Mr. Brown's employment was terminated in January 1993.

9. At least from the time of his promotion to senior vice president in May 1989 through the time of his termination, Brown reported directly to the chief executive officer, whether Tavares, Vent or Gibson.

10. In or about May 1989, Brown and four colleagues,

Don Webb, Donn Patton, Mich Sauers and Sims Hinds, were promoted to the positions of Senior Vice President. At or about the same time, Tavares, then the chief executive officer, informed the five new senior vice presidents that it was his intention to offer them written employment agreements. Patton was to work with Sanford Lipstein, the Chief Financial Inc., and a member of the compensation committee of the SMG board, to develop those agreements.

11. Although at the time of his promotion to senior vice president Brown may still have been a party to an original employment agreement signed at the time of his hire by Spectacor Management, that agreement provided him no entitlement to severance pay upon termination.

12. At the time of his promotion to senior vice president, Brown had no entitlement to severance pay upon termination based upon any other, written or oral, agreement, policy, or procedure of SMG.

13. At the time Brown and his colleagues were promoted to senior vice president and the issue of employment agreements was raised by Tavares, Tavares did not promise or otherwise make on behalf of SMG any binding commitment to specific terms.

14. Between the initial discussions between Tavares and the senior vice presidents and the August 23, 1989 SMG board meeting, other conversations took place between and among Tavares, the senior vice presidents and members of the SMG board concerning the terms of the proposed employment agreements. During these conversations, a general framework

for the proposed agreements began to take shape, including the concept of one year's severance pay, in the event SMG terminated the employee without cause, in exchange for a one-year non-competition agreement. Once again, no binding promises were made, and no agreement was reached.

15. There was also, from the very outset of even the most general discussion of terms, a dispute between SMG and the senior vice-presidents over the scope of the proposed non-compete.

16. On August 23, 1989, the SMG board approved in principle the essential terms of the proposed senior vice-president employment agreements, including one-year's severance (base salary and medical insurance only) if terminated without cause, a one-year non-compete, and a right of offset if other employment should be obtained during the severance period.

17. This board action was an approval in principle of the essential terms of the proposed agreements and not of the final versions of such agreements; to the contrary, Lipstein and Patton were to work with counsel to draft final forms of agreement, to be returned to the board for final approval.

18. Brown was present at this meeting and therefore knew or reasonably should have known (i) that the execution of a one-year non-compete agreement was an essential element of the consideration for any severance payment by SMG, (ii) that SMG's severance commitment, if any, would be limited to base salary and medical insurance, and (iii) that no binding agreement then existed.

19. This is the only reflection in the minutes of any SMG board meeting of any action of the board in approving or otherwise acting upon any aspect of the proposed senior vice president employment agreements.

20. Between the August 23, 1989, SMG board meeting and the date of Brown's termination, numerous drafts of the proposed senior vice-president employment agreements were drafted, circulated and discussed, but no agreement was ever reached concerning their essential terms, principally because of the continuing dispute between SMG and the senior vice-presidents over the scope of the proposed non-compete and the elements of compensation to which they would be entitled during the one-year severance period.

21. In or about April, 1990, there was some discussion at an SMG board meeting about the possible termination of Hinds, during which there may have been discussion of SMG's obligation, if any, to pay Hinds severance pay if he were terminated. The board later decided only to demote Mr. Hinds.

22. In or about February, 1991, and as part of the transaction in which ARA acquired a one-third interest in SMG, SMG disclosed to ARA the existence of certain "commitments" for severance agreements with Brown and the other senior vice presidents. Mr. Lipstein testified that this disclosure referred only to the general terms of the proposed agreements which had been approved in principle by the SMG board on August 23, 1989, and that neither referred to nor evidenced any final, binding or consummated agreement. He testified that these were, to the contrary, specifically referred

to as "commitments" in order to make clear that they referred to, at most, agreements in principle intended to be reduced to writing and not to final agreements intended to be binding in and of themselves. His testimony, which is consistent with Tavares's, I found to have been credible.

23. In or about early 1992, Webb left SMG and negotiated a severance agreement and release, which, among other things, recited his agreement that there existed no employment or severance agreement between him and SMG and that the severance payments being made to him under that severance agreement were in consideration for his undertakings.

24. I find as an ultimate fact that, at the time of Mr. Brown's termination, there existed between him and SMG no contract of employment or other agreement or policy requiring SMG to pay severance pay in the event of termination.

25. Gibson terminated Brown's employment with SMG, effective January 31, 1995.

26. When he informed Mr. Brown of his termination, Mr. Gibson also informed him that SMG continued to be willing to provide him with the general severance terms which had been on the table, so to speak, since 1989, although the agreement would now be in the context of a severance or settlement agreement containing a general release, rather than an employment agreement. Brown did not in that meeting assert any contractual entitlement to severance pay and agreed to Gibson's suggestion that their respective counsel "work out

the details". Given the lack of any objection or argument from Brown and anticipating a prompt resolution of the details, Gibson told Brown that, rather than interrupt his income during the anticipated negotiations between counsel, SMG would continue to pay his base salary and medical benefits.

27. Despite this finding as to Mr. Gibson's intent in this regard, there is no direct evidence that Gibson and Brown ever explicitly agreed that the continuation of Brown's base salary and medical benefits was to be in the nature of an advance against the anticipated agreement and subject to recoupment if no agreement was reached.

28. The parties never reached agreement on the terms of the severance agreement and, ultimately, SMG ceased making payments or providing medical insurance benefits in anticipation of it.

29. The total sums advanced to or on behalf of Brown in anticipation of a severance agreement were:

(a) Salary	$42,500.00
(b) Medical Insurance	4,921.04
(c) Payroll Taxes	3,287.21
Total	$50,708.25.

30. In the early Autumn of 1989, Mr. Brown became involved in a transaction which resulted sometime later in the restructuring and extension of SMG's relationship with the Long Beach Convention Center in Long Beach, California.

31. There is some testimony to the effect that at the time Brown became involved in the Long Beach project Tavares told him that, if he were successful on the project, Tavares "would take care of him", or words to that effect. In any event, according to Brown's own testimony, Tavares said nothing more specific regarding the manner in or extent to which Brown would "be taken care of."

32. Between the initial conversation in the Fall of 1989 and on or about December 13, 1990, neither Tavares nor anyone else in authority at SMG said anything to Brown about what Tavares may have meant about "taking care of him;" nor did anyone discuss with him any extra compensation on account of the Long Beach transaction. Therefore, as a matter of fact, Brown did not continue to perform the Long Beach assignment in reliance upon any other statement or promise by Tavares or anyone else during this period.

33. Brown and Tavares agree that the subject of additional compensation on account of the Long Beach transaction came up in two conversations between them in mid- to late-December 1990.

34. The substance of the conversations involved Brown's proposed bonus for calendar year 1990 under the SMG Executive Annual Incentive Plan.

35. Although Mr. Brown did inquire of Mr. Tavares concerning additional compensation on account of the Long Beach project, the inquiry was in the context of discussing his regular, annual bonus; the words "sales commission" were never used; and there was no reference to the SMG Sales

Incentive Plan.

36. Tavares told Brown that he (Tavares) believed that Brown ought to receive some future, financial recognition for the job he had done on the Long Beach project and that he (Tavares) would so recommend to the board, but that, in light of the Company's year-end financial results, it was his best judgment that such a recommendation would not be well received by the board at that time, particularly since the proposed Long Beach contract was not to take effect until July, 1991.

37. At no time during these conversations did Tavares promise Brown any "sales commission" or other specific form of additional compensation on account of the Long Beach project; to the contrary, Mr. Tavares promised, at most, to make some undefined recommendation to the SMG board in this regard at some unspecified time in the future.

38. On one or more occasions in early 1991, Mr. Tavares spoke to Mr. Webb and to one David Seldin, an SMG board member, concerning potential, additional compensation for Brown on account of the Long Beach project, and on at least one occasion Webb reported these conversations to Brown. At no time during any of these conversations did Tavares or Webb use the words "sales commission" or refer to the SMG Sales Incentive Plan in connection with potential, additional compensation to Brown.

39. At no time before Mr. Tavares's departure from SMG did he recommend to the board, nor, before that departure, did the board or its compensation committee ever

approve, any special or additional compensation to Brown on account of the Long Beach project.

40. In April, 1992, after Tavares's departure, Brown made a written recommendation to Vent, then SMG's Managing Director and acting Chief Executive Officer, concerning the 1991 annual bonuses for himself and others under the SMG Executive Annual Incentive Plan. In recommending his own bonus, Brown wrote:

> Consideration of an additional bonus for my efforts involving the 25 year extension in Long Beach was deferred from last year's bonus consideration until this year per my conversation with Tony.

I find this 1991 statement by Mr. Brown to evidence that, at most, he understood Mr. Tavares to have committed to consideration, consideration in the sense of something to be considered, not as a contractual quid pro quo, of an increased annual bonus payment because of the Long Beach project; it is undercuttingly inconsistent with Brown's later testimony that he understood Tavares to have promised him a sales commission under the SMG Sales Incentive Program. I credit the earlier, written words.

41. I find as an ultimate fact that Mr. Tavares made no promise, binding or otherwise, to pay Mr. Brown a sales commission under the SMG Sales Incentive Plan on account of the Long Beach project.

42. Mr. Brown further contends that, even if Mr.

Tavares made no promise to pay him a sales commission on account of the Long Beach project, he is nevertheless contractually entitled to that commission under the terms of the Sales Incentive Plan itself, because he "performed the duties of a salesman" in connection with the Long Beach project.

43. Brown was neither a commissioned salesperson nor a sales manager, who would thus have been .entitled to an override commission within the meaning of the SMG Sales Incentive Plan, as interpreted and applied.

44. The duties performed by Mr. Brown in connection with the Long Beach project were part of his ordinary job responsibilities as Senior Vice President for Operations.

45. I find as an ultimate fact that Mr. Brown is not entitled to a sales commission under the terms of the SMG Sales Incentive Plan, as interpreted and applied.

46. Brown was a participant in SMG's 1992 Interim Executive Annual Incentive Plan.

47. Under the terms of this plan, an executive has a "target bonus", calculated as a percentage of the executive's annual salary, which target can further increase or decrease, within specified limits, depending upon whether SMG's operating profit for the year falls short of, meets, or exceeds budget.

48. As Executive Vice President, Brown's "target bonus" percentage was 35% of his base salary and his 1992

base salary was $170,000, resulting in a "target bonus" of $59,500.

49. Under the Executive Annual Incentive Plan, and subject to a maximum "cap" on the bonus not applicable here, an executive's "target bonus" increases by three percent of base salary for every one percent by which SMG's operating profit exceeds budget.

50. In calendar year 1992, SMG's operating profit budget was $8.078 million and its actual operating profit was $8.248 million, or 102% of budget.

51. Because SMG's operating profit exceeded budget by two percent, Brown's "target bonus" increases from 35% of base salary to 41% of base salary, or $69,700.

52. Under the terms of the Executive Annual Incentive Plan, 70% of the "target bonus", known as the "financial component" or colloquially as the "quantitative Bonus," is earned by the executive outright. In Mr. Brown's case, this "financial component"'totals $48,790 ($69,700 x .70).

53. The Executive Annual Incentive Plan contains two provisions relevant to the remaining 30% of the "target bonus", known as the "discretionary" or "merit" component, or colloquially as the "qualitative bonus."

54. The section of the plan entitled "Determination of Awards -- Discretionary Portion" provides:

The remaining part of the IEAI provides for

> evaluating the individual performance objectives upon which this portion of the executive bonus will be based.
>
> The executive's respective supervisor is responsible for making a recommendation regarding his/her individual performance. This recommendation will be reviewed as part of the total IEAI award by the Compensation Committee of the Board.
>
> The bonus awarded will vary proportionally with performance, from zero to 130% of the guideline bonus. The same threshold requirement of attainment of 90% of operating income applies with regard to awarding the discretionary portion of the bonus.

55. The section of the plan entitled "Payment of Awards" provides, in relevant part:

> An executive whose employment terminates after the close of the bonus year but before bonus awards are paid will be eligible to receive any award attained under the payout formula of the financial portion of the Plan. Any bonus awards for personal achievement in the case of such terminations may be payable at the discretion of the President.

56. I find these plan provisions to be clear and unambiguous and to render the fact or amount of the

"discretionary" or "merit" component of the annual bonus entirely discretionary with: (a) the relevant supervisor and the compensation committee of the board in the first instance, and (b) the president, in the event that the employee's employment terminates after the close of the bonus year, but before bonus awards are paid.

57. Brown's employment terminated after the close of the 1992 bonus year, but before bonus payments were made.

58. Gibson was Brown's immediate supervisor at the time bonus awards for calendar year 1992 were made and paid, and he recommended and the board approved a total bonus award reflecting a full "financial component" and a small "discretionary" component, for a total bonus of $50,000.

59. Under the terms of the Executive Annual Incentive Plan, Gibson and the board had the full discretion to make, or to decline to make, an award of the "discretionary" component of the "target" bonus, and they in fact exercised that discretion in arriving at the award they did make.

60. SMG has credited Brown with a $50,000 bonus award for calendar year 1992.

61. I find as an ultimate fact that Brown has been credited with the full amount of any bonus component to which he can claim any contractual entitlement.

62. It is undisputed that Brown is entitled to payment for accrued but unused vacation in the gross amount of

$15,692.30. SMG has credited Mr. Brown with that amount.

63. It is undisputed that Brown is entitled to payment for certain business expenses in the amount of $550.00.

DISCUSSION

In this common-law contract dispute, governed by Pennsylvania law under Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), plaintiff SMG seeks to recover funds it paid to the defendant-claimant Brown following Brown's termination in January, 1993 and in apparent anticipation of a severance agreement with Brown that never materialized. Brown denies any legal obligation to repay the funds and makes four counterclaims against SMG. First, Brown claims that SMG has failed to pay him for accrued vacation and certain business expenses. SMG does not deny its liability to Brown for these sums. Second, Brown alleges that SMG breached an oral contract for severance benefits by not paying him one year's salary, automobile allowance, and health benefits following his termination. Third, Brown asserts that $MG owes him a bonus for 1992. SMG admits it owes him a bonus in the amount of $50,000, but not more. Fourth and finally, Brown demands a sales commission for a contract the extension of which he negotiated for SMG in 1990 and 1991.

The court finds for the plaintiff SMG on its claim for recoupment of funds advanced to Brown following his termination. The court finds for defendant-counterclaimant

Brown on his counterclaims for accrued vacation, sundry business expenses, and undisputed bonus. The court denies in full Mr. Brown's counterclaims for severance benefits and a sales commission and declines to substitute its judgment for SMG's management's discretion as to any further bonus for Brown.

I. SMG's Claim for Recoupment of Funds Advanced to Brown

Because SMG has proved that the payment of the funds to Brown following his termination was in anticipation of an amicable settlement of their post-termination differences, and because they never, in fact, reached that settlement, those funds must be returned. Although SMG terminated Brown effective January 31, 1993, it continued to pay base salary at a rate of $170,000 per year (Brown's 1992 base pay) and to provide health benefits to him. After three months of inconclusive negotiations, SMG stopped the cash payments, and six months later it ended his health coverage. Brown claims that an oral severance agreement entitles him to these funds, as well as to additional payments for the remainder of the year following his termination. As to this, he has not met his burden of proof. As I will examine below in denying this counterclaim, he did not show that SMG communicated an offer to him that he could accept to form a contract.

Further, Brown argues that the doctrine of promissory estoppel entitles him to keep these funds. Again, as I will examine below in denying this counterclaim, he has not

shown that SMG made a promise on which he could reasonably and detrimentally rely, nor that he relied on any promise.

He also asserts it was not until almost three months after his termination when SMG told him that it considered these payments mere advances on an eventual settlement. I do not, however, find the issue to turn on this delay. The parties were trying to work out their differences, but things went sour, and they did not. Obviously, had matters ended amicably, the pending set-offs and advancements would have been worked out on paper, computed to one final sum. Absent a settlement, however, that concept no longer is in the picture, and the money must be returned.

II. Brown's Claim for One Year's Severance Benefits

A. Brown's Claim that an Oral Agreement Entitles Him to Severance Benefits

To establish an alleged oral contract's existence, Brown introduced evidence in various areas: (1) the testimony of Antonio G. Tavares; (2) the ARA purchase agreement; (3) the discussions of the possible termination Sims Hinds; and (4) Mr. Brown's own testimony together with that of Mr. Don Webb.

(1) The Testimony of Antonio G. Tavares

Former president of SMG Antonio G. Tavares is now in California and testified by deposition. Although he said he thought that a severance agreement between SMG and Mr.

Brown had existed, Mr. Tavares also stated that he himself had never promised Brown any severance. Tavares N.T., pp. 54-55, 15. Moreover, he related that he could not recall if anyone had ever told Brown, as well as the other senior vice-presidents, that the senior vice-presidents had one year's severance benefits in absence of a written agreement Brown and the partnership never concluded. Tavares N.T., p. 132. I find that SMG never communicated an oral severance agreement to Mr. Brown.

Even should a firm have an employee policy, it must communicate the policy to these employees *for the* policy to obligate the firm. See Morosetti v. The Louisiana Land and Exploration Co., 552 Pa. 492, 494, 564 A.2d 151, 152 (1989). For, although a particular policy may exist in the minds of managers, "unless they communicate that policy as part of a definite offer of employment they are free to change as events may require." Morosetti, 552 Pa. at 496, 564 A.2d at 153. Consequently, the Tavares testimony provides no evidence of objective indicia of contract sufficient to bind SMG. Therefore, the court need not reach the issue of Tavares's actual or apparent authority to bind SMG to such an agreement. Even if Tavares had the authority to make an agreement and the belief that there was an agreement, this is not enough. It takes two to agree.

(2) The ARA Purchase Agreement

One of the schedules in the ARA purchase agreement sets forth in its list of potential liabilities a commitment to Brown and others for severance payments. Brown asserts that "Severance Agreement between the Partnership and Matt

Brown (commitment)" proves that a severance agreement existed or, at the very least, that this circumstantially evidences the presence of one. ARA Purchase Agreement, Schedule 3.12, Subsection 1.5.22. The closing binder, however, served merely as a representation to prospective investor ARA of all potential liabilities of SMG. Because SMG had offered its vice presidents severance packages as part of the proposed employment agreements, these potential liabilities remained outstanding. But the purchase agreement between ARA and SMG creates no rights in third parties. Its purpose, its function, is to put the potential purchaser of a portion of SMG on notice, not only as to SMG's assets, but also as to its possible liabilities. To err on the side of inclusion of all possible negatives is to protect SMG against possible later accusations for sins of omission. Its purpose, and its effect, are not to create binding contracts with third parties, whose inchoate, yet-executory interests happen to have been mentioned in the agreement, out of an abundance of inclusionary caution.

(3) The Discussions 'of the possible Termination of Sims Hinds

In addition, Brown points to the April 20, 1990, board meeting, in which the termination of a senior vice president, Sims Hinds, was discussed. He says this demonstrates the existence of an oral contract. The evidence reveals that Mr. Tavares considered proposing to the board that SMG should provide Hinds with one year's benefits if it terminated him. But the very fact that the board had to consider and decide whether Hinds would get the benefits undermines Brown's position that they were automatic. If a binding contract

already existed dictating that Hinds get benefits for an additional year, then Tavares would not have had to propose to the board that they consider whether to award him with his severance agreement benefits for an additional year. The conclusion is inescapable that there was no binding contract.

(4) Mr. Brown's Own Testimony together with that of Mr. Don Webb

Finally, both Brown and Webb testified that they believed they had oral severance agreements with SMG. Webb's testimony on this point, however, contradicts the recitals of his separation agreement with SMG. Nevertheless the witnesses' subjective beliefs, without more, do not create contracts.

B. Brown's Claim that the Doctrine of Promissory Estoppel Entitles Him to Severance Benefits

Alternatively, Brown argues that SMG made certain promises to pay one year's severance benefits, upon which he justifiably and detrimentally relied, and thus, 'he is entitled to have those promises enforced. Under Pennsylvania law, a party must establish three elements in order to succeed on a claim of promissory estoppel. First, "the promisor must make a promise that he should reasonably expect to induce action or forbearance on the part of the promisee." Holewinski v. Children's Hospital of Pittsburgh, 437 Pa. Super. 174, 178, 649 Ai2d 712, 714 (1994). Second, "the promise must actually induce such action or forbearance." Holewinski, 437 Pa. Super. at 178, 649 A.2d at 714. Finally, "injustice can be avoided only by enforcement of the promise." Holewinski,

437 Pa. Super. at 178, 649 A.2d at 714. Brown has not proved that SMG made any promise to him with respect to severance benefits, nor that he relied thereon. Moreover, he has not shown that any such "promise" induced him to take any action or forbear taking any action. Brown introduced evidence to the effect that he took no employment in violation of a covenant not to compete, a covenant the existence of which he expressly denies. Nonetheless, he failed to prove that he forbore opportunities of competitive employment because of SMG's "promise."

III. Brown's Claim for his 1992 Bonus, Accrued Vacation, and Business Expenses

That Brown is entitled to the undisputed $50,000 portion of his 1992 bonus, his accrued vacation, and sundry business expense reimbursement is not challenged. The only contested question is whether he is entitled to more bonus than SMG in its discretion gave him. I conclude not.

SMG had an Interim Executive Annual Incentive Plan under which the SMG management had the discretion to set a bonus for Brown anywhere from $48,790 to $69,700. They gave him $50,000. Brown argues that the court should imply a constructive condition into the contract and require SMG to determine the bonus in good faith and that SMG violated this constructive condition by setting the bonus as close to the minimum as it did. Pennsylvania law does not so require.

A bonus is defined in Black's Law Dictionary as a consideration or premium paid in addition to what is strictly due. Black's Law Dictionary 182 (6th ed. 1990). In Walling

v. Plymouth Manufacturing Corporation, 139 F.2d 178, 182 (7th Cir. 1943), the court, speaking through Judge Sherman Minton, distinguished a bonus from the distribution' of profits in accordance with the articles of partnership, saying a "bonus is a gratuity to which the recipient has no right to make a demand.

Notwithstanding the general definition or meaning of the term "bonus", Brown argues that this court should order SMG to pay him more bonus than they in their discretion had awarded, relying principally upon Widmer v. Widmer, 176 Pa. Super. 264, 106 A.2d 875 (1954). In that case, an automobile salesman was asked by his employer, who was preparing to go to California, to take care of the business while the employer was gone, and that if he performed those extra duties, the employer would give the employee a "bonus" at the end of the year. When the employer returned from California, he again assured plaintiff he would give him a "bonus" at Christmas, and told him the amount would be $2,000.00. Christmas came, but the money did not. The Superior Court held that particular "bonus" was enforceable. That case, of course, is distinguishable. Although the amount there in question was termed a bonus, in point of fact it was bargained-for consideration, for specific additional work that the employee agreed he would perform for the employer. The bonus at bar, however, is not an agreement to pay more money for more work done, but is a true bonus, and I conclude that it is not subject to something in the nature of specific performance, but rather, is more in the nature of a wished-for hope. It is not enforceable.

IV. Brown's Claim for a Long Beach Sales

Commission

Brown argues that, under a contract between SMG and him, he was entitled to receive commission moneys, according to the following formula:

Year	Percentage
1	5
2	4
3	3
4	2
5	1

The column on the left represents the year of the contract in question, and the column on the right represents the percentage of SMG's net income from the contract due to the salesperson. For example, in the third year of the contract, the salesperson responsible for the contract, assuming sole responsibility, would receive 3 percent of SMG's net income from the contract, where the Sales Incentive Program defined "net income" as "management fees earned" plus "other revenue" minus overhead and "the amortized costs of sale." Plaintiff's Ex. 47.

Mr. Brown had been a prime force in renegotiating a contract between SMG and the city of Long Beach, California, for managing its Convention Center. The contract had approximately seven years yet to run on it, but under his labors, it was extended to run for another twenty-five years, with what proved to be quite lucrative terms for SMG. He says the formula computes to his being duly owed $837,000.

His quest for the sum raises several issues:

(1) Was there such a commissions contract?

(2) If so, did he, because of his position as a senior vice president within the organizational structure of SMG, qualify to benefit from it?

(3) Assuming his job position qualified him to receive the commissions, did the transaction which took place with Long Beach qualify as a sale in the context of which the commissions provision kicked in and he would be entitled to the money?

(1) The Existence of a Sales Commission contract

Mr. Brown referred repeatedly at trial to Donn Patron's memorandum to files of October 28, 1990, concerning the "SALES INCENTIVE PROGRAM," in his effort to prove the existence of the contract. Plaintiff's Ex. 47. SMG did not seriously contest the point, but did deny that the contract applied to Mr. Brown, an issue I will examine below. The sales commission program is something of a curious concoction. It was hatched by the senior vice presidents, Messrs. Webb, Patton, Sauers, and Brown. But once they came up with it, they did not seem to tell anyone else about it. The sales force, for example, was not apprised of its existence--something of an odd table of distribution for a plan the supposed purpose of which was to goad employees into making more and bigger sales. To those folks, it was something of a tree falling within the locked boardroom. It was potentially quite lucrative to those whom it affected. It

was something that those in the inner circle came up with, and it seems to have been something that the inner circle pretty much kept to itself. Curious, indeed. I conclude that a Sales Incentive Program did exist and that it bound SMG.

(2) The Applicability of the sales Incentive Program to Mr. Brown as Senior Vice President for Operations

There was a wealth of testimony, which I believed, that the commissions contract only applied to those within the sales force, or the vice president in charge of that force.

In that regard, counsel for Mr. Brown adduced testimony as to conversations between Messrs. Webb and Tarares the two held while flying back from London. Mr. Webb was urging Mr. Tavares to reward Mr. Brown with some extra money in consideration for the good work Mr. Brown had done on the Long Beach project. If the commission provisions were applicable to him under the Sales Incentive Program, then they would automatically apply to Mr. Brown, and there would have been no need to discuss the merits of making special arrangements for beneficently sweetening his next-impending paycheck. The numbers would have been committed to Mr. Brown automatically, according to the percentage formula. In my view, this compellingly rebuts Brown's argument that the Sales Incentive Program applied to him.

(3) The Qualification of the Long Beach Contract Extension under the Sales Incentive Program

I turn to the third question, that is, whether the

transaction which was consummated on the Long Beach contract falls within the ambit of the sales incentive program and thus calls for his receiving his commission, euphemistically described in the documents, Plaintiff's Ex. 47, Defendant's Ex. 119, as "Incentive Percentages." On the one hand, it is true that the document by its terms says that "it will apply to all contracts sold after May 1, 1990." This Long Beach contract was entered into after May 1, 1990, and it was indeed a contract. Thus, it would appear prima facie to be a qualifying contract. But I must not read the provision in a vacuum, but rather, within the context of the company and the context of commerce. The very term "Sales Incentive Program" seems to suggest something in the nature of a new sale. That is to say, if one brings in a brand new customer, and lines him up for a contract, that would be a sale in the normal sense of the word. In our line of work, this is often referred to as "making rain". On the other hand, if one has a longtime customer, who is simply renewing - with some modifications - a longtime contract, that transaction is less of a sale than a continuation of existing business. It lacks some of the true rainmaking aspect of a customer new to the company.

Again, to analogize to the occupation of the practice of the law,[1] if a young associate brings in a brand-new

---

[1] I recognize that there are vast differences between the stadium-management business and the business of the law, but I nevertheless deem the analogy to have some relevance. In either field, one generally does not get credit for abating the economic drought unless one has actually, successfully seeded the cloud. Passively waiting for the annual April showers to return does not

corporation client to the firm, that is a very different situation from a young associate who is sent to work upon a new piece of legal business for a corporate client who has been with the firm ever since William Penn was making treaties with the Indians.

The Long Beach contract does not go back that far with SMG, but it is much more a renewal of an existing relationship than the landing of a new customer. I conclude that the events which transpired surrounding the Long Beach contract did not qualify as a sale in the sense that word was meant.

In any event, it is not entirely clear to me that the counterclaimant has proved by a preponderance of the evidence that there even was a sales incentive program. But it is clear that even if there were one, it did not apply to Mr. Brown. He held a high position in the company as senior vice-president, compensated by a significant salary--more than the compensatory structure of a salesman, who would typically have a smaller salary significantly augmented by commissions. His direct duties did not involve sales His job description was not that of a salesman. I conclude that he fell outside the purview of the program. So also do I find that the transaction in Long Beach does not qualify as a sale under the terms of the so-called Sales Incentive Program. For those various reasons, I conclude that Mr. Brown is not entitled to the money he seeks.

---

qualify one as a rainmaker. Post hoc, sed non propter hoc.

CONCLUSIONS OF LAW

1. This court has subject-matter jurisdiction under 28 U.S.C. § 1332, as the parties are citizens of different states and the amount in controversy exceeds $50,000, exclusive of interest and costs.

2. This court has personal jurisdiction over the parties.

3. Venue is proper in this judicial district under 28 U.S.C. § 1391(a) as the district in which a substantial part of the events or omissions giving rise to the claims occurred.

4. SMG has proved by a fair preponderance of the evidence that the payments it made to or on behalf of Brown after the date of his termination, in a total amount of $50,708.25, were advances against an anticipated settlement and are subject to recoupment.

5. Brown has failed to prove by a fair preponderance of the evidence that he had a contractual entitlement to severance pay or benefits from SMG in the event of his termination.

6. Brown has failed to prove by a fair preponderance of the evidence that he had a contractual entitlement to a "sales commission" on account of the Long Beach project.

7. Brown has failed to prove by a fair preponderance of the evidence that he had a contractual entitlement to any annual bonus payment for calendar year 1992 beyond that

which has been credited to him.

8. It is undisputed that Brown is entitled to payment from SMG for the undisputed portion of his 1992 annual bonus ($50,000), unused vacation ($15,692.30) and business expenses ($550). These sums, in total, exceed the sum Brown owes SMG pursuant to Conclusion of Law No. 4 above.

Spectacor Management Group v. Matthew Brown
No. 93-5246

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPECTACOR MANAGEMENT GROUP,
Plaintiff

v.

MATTHEW G. BROWN,
Defendant/Counterclaimant

CIVIL ACTION
NO. 93-5246

ORDER

AND NOW, this 27th day of September, 1996, upon consideration of the testimony and evidence presented at trial and the parties' proposed findings of fact and conclusions of law, it is hereby ORDERED that:

1. Plaintiff Spectacor Management Group's claim for recoupment of funds advanced is GRANTED;

2. Defendant Matthew G. Brown's counterclaims *for* his accrued vacation, business expenses, and undisputed 1992 bonus are GRANTED;

3. Defendant's counterclaims for severance benefits, a sales commission, and a greater 1992 bonus are DENIED;

4. Defendant is awarded damages in the amount of

Spectacor Management Group v. Matthew Brown
No. 93-5246

$15,535.05.
/s/_____
Robert S. Gawthrop, III, J.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPECTACOR MANAGEMENT GROUP
701 Market Street Philadelphia, PA 19106,
Plaintiff,

v.

MATTHEW G. BROWN
7 Wethersfield Drive
Medford, NJ 08055,
Defendant.

CIVIL ACTION NO. 93cv5246

COMPLAINT

Parties

1. Plaintiff, Spectacor Management Group ("SMG"), is a Pennsylvania general partnership with its principal place of business at 701 Market Street, Philadelphia, Pennsylvania 19106.

2. Defendant, Matthew G. Brown, is an adult individual, and a citizen of the state of New Jersey with an address at 7 Wethersfield Drive, Medford, New Jersey 08055.

Jurisdiction and Venue

3. The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1332(a)(1) because Brown is a citizen of New Jersey, the Defendant is a citizen of Pennsylvania, and the controversy exceeds $50,000, exclusive of interest and costs.

4. Venue lies in this judicial district pursuant to 28 U.S.C. §1391(a) (2) because a substantial part of the events or omissions giving rise to this claim occurred in the Eastern District of Pennsylvania.

Background

5. On or about December 9, 1985, Brown began working for the Plaintiff as an at-will employee in the position of Facility Manager.

6. On or about February 28, 1992, Brown was promoted to the position of Executive Vice President of Operations. Brown remained Executive Vice President until January 31, 1993.

7. SMG terminated Brown's employment, effective January 31, 1993.

8. During the month of January, 1993, SMG commenced negotiations with Brown with respect to a Settlement Agreement and General Release pertaining to his termination of employment.

9. One aspect of those negotiations on which the parties reached agreement subject to agreement on all other

issues, was Brown's request that SMG continue to pay his salary and medical benefits for a period of one year.

10. At Brown's request and as a demonstration of its good faith and subject to reimbursement if agreement was not reached on all issues, following the termination, SMG continued to pay Brown his salary and provide him with medical insurance benefits as an advance against the overall settlement then being negotiated.

11. Pursuant to this arrangement, SMG made salary advances to Brown totaling $42,501.00, paid health insurance premiums totaling at least $4,921.04, and incurred payroll tax liabilities on the salary advances totaling at least $3,287.21.

12. Negotiations between SMG and Brown failed to produce agreement on all issue.

13. SMG has ceased further advances of salary.

14. Brown has failed or refused to refund or return to SMG the salary advances, insurance premiums, and payroll tax payments, aforesaid.

COUNT I - BREACH OF CONTRACT

Paragraphs 1 through 14 are incorporated herein by reference .

The conduct of Brown, as set forth above, constitutes a breach of the contract existing between Brown and SMG.

WHEREFORE, Plaintiff, SMG, demands Judgment against

the Defendant for a sum in excess of $50,000.00, for salary continuation and benefits paid and liabilities incurred as aforesaid, subsequent to the date of Brown's termination, reasonable attorneys' fees, interest, costs and any other relief the Court may deem just and proper.

/s/_____
WILLIAM A. WHITESIDE, JR.
JAMES A. MATTHEWS, III
FOX, ROTHSCHILD, O'BRIEN & FRANKEL
2000 Market Street,
10th Floor
Philadelphia, PA 19103-3291
(215) 299-2000

Attorneys for Plaintiff
Spectacor Management Group

Date: October 1, 1993

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPECTACOR MANAGEMENT GROUP
Plaintiff

v.

MATTHEW G. BROWN
Defendant and Counterclaimant

CIVIL ACTION
NO. 93-CV-5246

ANSWER, DEFENSES AND COUNTERCLAIM

1. Admitted that Plaintiff holds itself out as a general partnership. Plaintiff is without knowledge or information sufficient to form a belief as to the truth of the remainder of the averment, and it is denied.

2. Admitted.

3. Admitted that Defendant is a citizen of New Jersey. Plaintiff incorporates by reference number one, above. Plaintiff denies that the amount in the controversy plead in the Complaint exceeds $50,000, and Defendant avers that the items alleged by Plaintiff to reach the $50,000 threshold are not compensable damages, assuming *arguendo* that Plaintiff has stated a valid cause of action.

4. Admitted only that events mentioned in the Complaint occurred in this District.

5. Denied. Plaintiff was first employed by a partnership known as "SMI Partnership" pursuant to a written contract signed in December of 1985, which guaranteed Defendant a term of no less than fifteen months employment and advance notice of ninety. days. Thereafter, in 1988, SMI Partnership merged with Facility Management Group in 1988, and Plaintiff was formed and Defendant continued his employment with Plaintiff. To the extent that it is implied that Plaintiff did not subsequently enter into additional certain employment related agreements with Plaintiff which are relevant hereto, it is denied. Plaintiff incorporates herein by reference his Counterclaim.

6. Denied as stated. Defendant was the Plaintiff's Executive Vice President as of February, 1992, and he was also its Chief Operating Officer; Defendant served also as Chief Executive Officer of Plaintiff from approximately March of 1992, until approximately August of 1992.

7. Admitted.

8. Denied as stated. SMG had no direct communications with Plaintiff concerning any "settlement Agreement". Plaintiff's Attorney of record in this case and an attorney representing Defendant did exchange correspondence and drafts of possible agreements, but there was no meeting of the minds, and no agreement. It is averred further that SMG and Defendant already had a long-standing agreement concerning what Defendant would be paid upon his

termination, and this was memorialized by the Board of Directors of Plaintiff and disclosed in public documents as early as January, 1991; however, SMG's said attorney sought to alter that agreement. Defendant incorporates herein by reference, his Counterclaim, as though set forth at length.

9. Denied as stated. There were many aspects of the agreement that Plaintiff and Defendant had reached prior to 1991, including the amount of Plaintiff's severance pa,! and medical benefits, among others. That agreement was supported by its own consideration, including, *inter alia,* Defendant's agreement to continue to be employed by SMG, and to assume new executive responsibilities. The attorney for SMG offered no new consideration for new restrictions and obligations he wanted Defendant to assume, or for the reduction in the previously agreed upon sums and benefits he wanted Defendant to give up. It is specifically denied that Defendant made any direct or indirect "request that SMG continue to pay his salary and medical benefits for a period of one year". On the contrary, SMG voluntarily commenced payment of same to Defendant under the said agreement, without even consulting Defendant, and continued to make the payments in accordance with the said agreement until it concluded that Defendant was not willing to give up the terms of the agreement in exchange for the less favorable terms Plaintiff's counsel attempted to force on Defendant. Thereafter, in an effort to use economic coercion against Defendant, Plaintiff precipitously stopped the agreed upon payments to Defendant.

10. Denied. The allegation is an unmitigated falsehood, and a violation of Fed. R.Civ. Pro. 11. At no time

did Plaintiff ever communicate that any sum it paid to Defendant was "subject to reimbursement", nor was there ever even a suggestion that what was paid to Defendant was "an advance". Moreover, Plaintiff made no demand, request or utterance asking for a return of the sums paid to Defendant until it filed the instant lawsuit.

11. Denied as stated. The sums paid to Defendant were made pursuant to the agreement entered into prior to 1991, as aforesaid, and not pursuant to the *fictional* "arrangement" Plaintiff has fabricated in its Complaint. Defendant admits to having received salary continuation payments of $42,501.00. He also received health insurance benefits, the value of which he lacks sufficient information about to form a belief as to the truth of the averment. It is denied that any tax liability is compensable damages to Plaintiff, and if it is, Defendant lacks sufficient information to form a belief as to the truth of the averment.

12. Admitted only that no agreement was reached in negotiations with Plaintiff's counsel. All inferences which are inconsistent with the answers above are denied. 13. Denied as stated. It is admitted only that SMG has ceased all payments to Defendant.

14. Denied as stated. Prior to the institution of this lawsuit, no demand was made for any "refund or return". Defendant incorporates by reference his answers to numbers 9-11.

COUNT I

Defendant incorporates by reference his answers at numbers 1-14.

It is denied that Defendant's conduct constitutes a breach of contract, or that any contract, as alleged, ever existed.

WHEREFORE, Defendant demands judgement against Plaintiff, as well as costs and expenses as a result of Plaintiff's false allegations and violation of Rule 11, and whatever other relief is just and appropriate under the circumstances.

DEFENSES

15. Defendant incorporates by reference his Answer.

16. The Court lacks jurisdiction over the subject matter in that the amount in controversy does not exceed $50,000.

17. Plaintiff has failed to state a valid claim upon which relief can be granted.

18. Plaintiff as a partnership lacks the capacity to sue; the real parties in interest are the partners; and after discovery, Defendant reserves the right, if the facts are so developed, to assert that due to the citizenship of the partners in SMG, the court further lacks diversity jurisdiction.

19. Plaintiff has failed to properly allege the time and place of the alleged contract it claims was breached, both of which are material to its case.

20. The alleged contract fails for lack of consideration; lack of offer and acceptance; lack of mutuality of assent; and because Plaintiff was already obligated to provide the sums and benefits to Defendant, as alleged in the Answer and Counterclaim, both of which are incorporated herein by reference.

21. Plaintiff's claim is barred or off-set by the damages it caused to Defendant, as alleged in the Counterclaim.

22. Plaintiff failed to mitigate its damages.

23. Plaintiff's claim is really one which sounds in Equity as a claim for restitution, and as such Plaintiff is barred by its own unclean hands.

24. Plaintiff's claim is barred by the defense of estoppel.

25. Plaintiff's claim is barred by the defense of waiver.

26. Plaintiff's claim is barred by the Statute of Frauds.

27. Plaintiff has pleaded improperly settlement negotiations, and has asked improperly for recovery of attorney fees with no legal basis; and those portions of the

Complaint should be stricken.

28. The supposed contract plead by Plaintiff is a falsehood and a recent fabrication with no basis in fact; Plaintiff's Complaint was filed in bad faith to harass Defendant after Defendant put Plaintiff on notice that he intended to sue it for breaching the agreement mentioned in the Answer and Counterclaim.

WHEREFORE, Defendant demands judgement against Plaintiff as well as costs and expenses as a result of Plaintiff's false allegations and violation of Rule 11, and whatever other relief is just and appropriate under the circumstances.

COUNTERCLAIM

29. Defendant Brown incorporates by reference his Answer and Defenses.

30. At the time of the termination of Brown's employment, in January of 1993, he and Plaintiff SMG were bound by a contract which was first agreed in around April of 1989, and which was implemented and further developed during the interim, until August 1992. ("Employment Contract") Brown relied on the said Employment Contract in continuing his employment with SMG, forgoing other opportunities that were offered or available to him, and in accepting more responsibility for SMG's operations.

31. The said Employment Contract was reaffirmed by SMG repeatedly to certain executives of SMG, including Brown (who had accepted it originally, and continued to rely

on it) including in January of 1991 when its effect was reported in disclosure documents generated in connection with the acquisition by a new entity (ARA), of a 1/3 interest in SMG.

32. The Employment Contract was documented and announced at a SMG Board of Directors meeting held in New York City in April of 1989, and reference to it was made in other official documents disseminated to executives by SMG. Moreover, in his role as CEO, Brown himself reaffirmed and received confirmation of the Employment Contract.

33. In January of 1993, Brown's annual salary (exclusive of bonuses, fringe benefits and commissions) was $170,000, and his annual auto allowance was $7,800.

34. The Employment Contract provided that upon termination, Brown would be paid his annual auto allowance for one year and would receive medical insurance benefits for one year.

35. Under the terms of the Employment Contract, Brown also was guaranteed and promised no less than one year's severance pay in the event that his employment was terminated by Plaintiff.

36. SMG has breached the Employment Contract by not paying Brown the sums SMG promised to pay upon his termination.

37. SMG has stopped Brown's medical insurance coverage, and it therefore owes him a yet to be liquidated sum

for its replacement.

38. SMG has paid none of Brown's auto allowance, and has paid him only $42,500 in severance pay; therefore, pursuant to the said Employment Contract, SMG owes Brown $7,800 in auto allowance and $127,500 in severance pay.

39. Another aspect of the Employment Contract was a formal bonus program offered to certain executives, including Brown (and accepted by him), pursuant to which SMG is obligated to pay Brown, $70,720 based on Brown's and SMG's performance for 1992. SMG has further breached the said Employment Contract by failing to pay Brown the said bonus due to him.

40. Another aspect of the Employment Contract is SMG's promise to pay Brown for unused vacation time and out-of pocket expenses. SMG owes Brown $17,000 for 24 vacation days and $550 for said expenses, which in breach of the said Employment Contract, it has refused to pay.

41. During 1990, pursuant to the policies and practices at SMG, and pursuant to a specific agreement Brown made with SMG, Brown was to perform the role of "salesperson" (in addition to his other duties) in connection with a particularly difficult project known as "Long Beach"; and as an incentive to Brown, he was promised the sales commission that would have been paid to a salesperson. Brown was not obliged under his job description to perform the salesperson's role, but he did so in anticipation of the commission.

42. As a result of the efforts of Brown, the Long

Beach project was a financial windfall to SMG, and based on the said agreement and a salesperson's normal commission structure, SMG owes Brown $837,095. SMG has breached its promise to pay Brown the said commission, and it is still due and owing.

43. As a result of SMG's said breaches of the Employment Contract and its other agreements with Brown, Brown has suffered damages in an amount in excess of **$1,060,665.00.**

WHEREFORE, Counterclaimant Brown demands judgement against Spectacor Management Group in an amount in excess of $1,060,665.00, plus interest, costs, damages and whatever other relief the Court finds just and appropriate under the circumstances.

Respectfully submitted,

/s/_____
GARY GREEN

OF COUNSEL:

SIDKOFF, PINCUS & GREEN, P.C.
530 Walnut Street, 12th Floor
Philadelphia, Pennsylvania 19106
(215) 574-0600

DATED: November 1, 1993

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPECTACOR MANAGEMENT GROUP
Plaintiff,

v.

MATTHEW G. BROWN
Defendant.

CIVIL ACTION
NO. 93-5246

PLAINTIFF'S ANSWER TO DEFENDANT'S COUNTERCLAIM

The Plaintiff, Spectacor Management Group ("SMG" or the "Company") by its undersigned attorneys, answers the correspondingly numbered paragraphs of the Defendant's Counterclaim as follows:

15-28. SMG incorporates the allegations of paragraphs 1 through 14 of its Complaint as if fully set forth. Insofar as paragraphs 15 through 28 of Defendant's Answer allege facts, they are denied. The remaining allegations of paragraphs 15 through 28 of the Answer state conclusions of law to which no responsive pleading is required.

29. SMG incorporates the allegations of paragraphs 1

through 14 of its Complaint as if fully set forth.

30. Denied. By way of further answer, the allegations in paragraph 30 of the Counterclaim state conclusions of law to which no responsive pleading is required.

31. Denied. By way of further answer, the allegations in paragraph 31 of the Counterclaim state conclusions of law to which no responsive pleading is required.

32. Denied. By way of further answer, the allegations in paragraph 32 of the Counterclaim state conclusions of law to which no responsive pleading was required.

33. Admitted in part and Denied in part. It is admitted only that, at the time his employment was terminated, Defendant's annual salary (exclusive of bonuses and fringe benefits) was $170,000 and his annual auto allowance was $7,800. The remaining allegations of paragraph 33 of the Complaint are denied.

34. Denied.

35. Denied.

36. Denied. By way of further answer, the allegations in paragraph 36 of the Counterclaim state conclusions of law to which no responsive pleading is required.

37. Admitted in part and Denied in part. It is admitted only that SMG has stopped Defendant's medical insurance coverage. The remaining factual allegations in paragraph 37

of the Counterclaim are denied. The remaining allegations in paragraph 37 of the Counterclaim state a conclusion of law to which no responsive pleading is required.

38. Admitted in part and Denied in part. It is admitted only that SMG has not paid Defendant an auto allowance since his termination and has paid him $42,500 in severance pay since the date of his termination. The remaining factual allegations in paragraph 38 of the Counterclaim are denied. The remaining allegations in paragraph 38 of the Counterclaim state conclusions of law to which no responsive pleading is required.

39. Denied. By way of further answer, the allegations in paragraph 39 of the Counterclaim state conclusions of law to which no responsive pleading is required.

40. Denied. By way of further answer, the allegations in paragraph 40 of the Counterclaim state conclusions of law to
which no responsive pleading is required.

41. Denied.

42. Denied. By way of further answer, the allegations in paragraph 42 of the Counterclaim state conclusions of law to which no responsive pleading is required.

43. Denied. By way of further answer, the allegations in paragraph 43 of the Counterclaim state conclusions of law to which no responsive pleading is required.

WHEREFORE, the Plaintiff, Spectacor Management Group, respectfully requests that judgment be entered in its favor and against the Defendant, Matthew G. Brown, that the Counterclaim be dismissed with prejudice and that SMG be awarded its costs in defending this Counterclaim, including a reasonable attorneys' fee.

Date: November 11, 1993

/s/_____

WILLIAM A. WHITESIDE, JR., ESQUIRE
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Attorneys for Plaintiff
Spectacor Management Group

Date: November 11, 1993

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPECTACOR MANAGEMENT GROUP,
Plaintiff

v.

MATTHEW G. BROWN,
Defendant and Counterclaimant

CIVIL ACTION
NO. 93-CV-5246

MOTION OF DEFENDANT-COUNTERCLAIMANT MATTHEW G. BROWN FOR SUMMARY JUDGMENT ON ALL CLAIMS AND SUPPORTING MEMORANDUM OF LAW

GARY GREEN
ROBERT A. DAVITCH
Attorneys for Defendant-Counterclaimant,
Matthew G. Brown

OF COUNSEL:

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530 Walnut Street, 12th Floor
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Spectacor Management Group v. Matthew Brown
No. 93-CV-5246

(215) 574-0600

DATED: June 9, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPECTACOR MANAGEMENT GROUP,
Plaintiff

v.

MATTHEW G. BROWN
Defendant and Counterclaimant

CIVIL ACTION
NO. 93-CV-5246

ORDER

AND NOW, this day of ,1994, upon consideration of the Motion for Summary Judgment of Defendant-Counterclaimant Matthew G. Brown, and supporting memorandum of law and exhibits, and the response thereto of Plaintiff, Spectacor Management Group ("SMG"), and the arguments of counsel, it is hereby ORDERED and DECREED that the said Motion be and the same is hereby GRANTED.

It is further ORDERED that:

(1) Summary Judgment is GRANTED in favor of

Brown and against SMG on SMG's claim against Brown for reimbursement of severance pay, health insurance premium payments and other expenses, and SMG's Complaint against Brown is DISMISSED WITH PREJUDICE;

(2) Summary Judgment is GRANTED in favor of Brown and against SMG in the amounts of $127,500. plus interest for unpaid severance pay; $7,800. plus interest for unpaid auto allowance; and $2,068. plus interest for replacement health insurance costs;

(3) Summary Judgment is GRANTED in favor of Brown and against SMG in the amounts of $15,692. plus interest for unused vacation time, and $550. plus interest for unreimbursed expenses;

(4) Summary Judgment is GRANTED in favor of Brown and against SMG in the amount of $70,720. plus interest for Brown's unpaid bonus for 1992; and

(5) Summary Judgment is GRANTED in favor of Brown and against SMG in the amount of $837,095. plus interest for Brown's unpaid commission for the Long Beach project.

BY THE COURT:

/s/_____
ROBERT GAWTHROP, III, J.

Spectacor Management Group v. Matthew Brown
No. 93-CV-5246

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPECTACOR MANAGEMENT GROUP,
Plaintiff

v.

MATTHEW G. BROWN,
Defendant and Counterclaimant.

CIVIL ACTION
NO. 93-CV-5246

MOTION OF DEFENDANT-COUNTERCLAIMANT MATTHEW G. BROWN FOR SUMMARY JUDGMENT

Defendant-counterclaimant, Matthew G. Brown ("Brown"), by his attorneys, Sidkoff, Pincus and Green, P.C., hereby moves tills Honorable Court for an order granting summary judgment in his favor and against Plaintiff, Spectacor Management Group ("SMG"), on the claim asserted by SMG against Brown in SMG's Complaint. and on all of the claims asserted by Brown against SMG in Brown's Counterclaim, In particular, Brown requests that:

(1) Summary Judgment to be granted in favor of Brown and against SMG on the claim asserted in SMG's Complaint against Brown for reimbursement of severance pay, health insurance premium payments and other expenses;

(2) Summary Judgment be granted in favor of Brown and against SMG in the amounts of $127,500. plus interest for unpaid severance pay; $7,800. plus interest for unpaid auto allowance; and $2,068. plus interest for replacement health insurance costs;

(3) Summary Judgment be granted in favor of Brown and against SMG in the amounts of $15,692. plus interest for unused vacation time and $550. plus interest for unreimbursed expenses;

(4) Summary Judgment be granted in favor of Brown and against SMG in the amount of $70,720. plus interest for Brown's unpaid bonus for 1992; and

(5) Summary Judgment be granted in favor of Brown and against SMG in the amount of $837,095. plus interest for Brown's unpaid commission for the Long Beach project.

In support of this Motion, Brown relies upon the Memorandum of Law attached hereto and incorporated herein by reference, and upon the deposition testimony of Brown and Donald Webb and the other exhibits that are included in the Appendix to this Motion which is being filed under separate cover.

Respectfully submitted,

/s/_____
GARY ROBERT. A. DAVITCH
Attorneys for Defendant-Counterclaimant,

Matthew G. Brown

OF COUNSEL

SIDKOFF PINCUS & GREEN, P.C.
530 Walnut Street - 12th Floor
Philadelphia, PA 19106
(215) 574-0600

DATED: June 9, 1994

* * *

$42,500, SMG still owes him $127,500. Since SMG had a contractual obligation to pay Brown $170,000. in severance pay, its claim against him for reimbursement of the payments it made to him cannot be sustained as a matter of law. Since the severance package SMG agreed to pay to its terminated senior executives also included auto allowance and health insurance benefits for one year, Brown is also entitled to summary judgment on his claims for $7,800. in unpaid auto allowance and $2,068. for replacement health insurance costs he paid from November 1, 1993 to January 31, 1994. Since SMG was also contractually obligated to continue Brown's health insurance coverage for one year following his termination, Brown is also entitled to summary judgment on SMG's claim against him for reimbursement of $4,921 in health insurance premium payments SMG made on his behalf from January 31, 1993 through October 31, 1993. Based on the testimony of Brown and Webb, SMG's documents and the admissions of the parties, there are no genuine issues of material fact on these issues, and Brown is therefore entitled

to judgment as a matter of law.

C. Facts Entitling Brown to Summary Judgment on His Claims Against SMG for $15,692. in Unpaid Vacation Benefits and $550 in Unreimbursed Expenses

In his Counterclaim, Brown alleged that SMG breached its employment agreement with him by failing to pay him for 24 unused vacation days and $550 in reimbursable out-of-pocket expenses. Exhibit 2 at para. 40. There are no genuine issues of material fact on these claims either, thereby entitling Brown to summary judgment against SMG in the amounts of $15,692. (for vacation pay) and $550 (for unreimbursed expenses).

In a letter to Brown's former counsel, James Roscetti, Esquire, dated February 26, 1993, SMG's counsel, James A. Matthews, III, Esquire, confirmed "that Mr. Brown will receive his appropriate vacation pay". Exhibit 9 of Appendix at p. 3. In the same letter, Matthews stated that Brown would be reimbursed for his properly documented current expenses, meaning those incurred within 90-120 days of his termination date. Exhibit 9 at p. 3. Roscetti wrote back to Matthews on April 23, 1993, reminding Matthews that "with respect to vacation pay, ... your prior correspondence has indicated that same would be paid, it has not, to date, in fact, been paid". Exhibit 10 at p. 2. Brown's Affidavit and a letter from SMG to its counsel dated May 6, 1993, confirm that Brown is owed $15,692. for 24 unused vacation days and $550. in expenses. Exhibits 8 and 11.

At his deposition on January 24, 1994, Brown testified (in response to questions by Matthews) that he still had not received the promised vacation pay or reimbursement for his expenses (Brown depo.. at 337-339). Brown stated,

> "[My] outstanding vacation pay .... has not been paid to me, despite a written document from you indicating to my counsel that there was an obligation and you expected SMG to make payment to me.
>
> Further, the issue of an outstanding $550 for outstanding reimbursement of expenses owed to me and confirmed by SMG [has] yet to be received, which was further evidenced in a document provided by you to my counsel."

(Brown depo. at 339). In spite of correspondence from SMG's counsel "which confirmed the obligation of SMG to pay [Brown these] funds", these amounts are still due and owing to Brown (Brown depo. at 337-338). There being no genuine issue of material fact as to whether SMG owes these sums to Brown, summary judgment should be granted in Brown's favor in the amount of $15,692. for unused vacation time and $550 for unreimbursed out-of-pocket expenses. These items should have been paid by SMG long ago.

D. Facts Entitling Brown to Summary Judgment on His Claim Against SMG for an Unpaid 1992 Bonus of $70,720.

In his Counterclaim, Brown also requested judgment against SMG in the amount of $70,720, which should have been his 1992 bonus. Exhibit 2 at para. 39.. Brown alleged that, in further breach of its employment agreement with him, SMG failed to pay him this bonus, or any portion thereof. Exhibit 2 at para. 39. For the following reasons, this is another claim on which Brown is entitled to summary judgment.

In 1992, SMG had a formal bonus program for certain senior executives, including Brown (Brown depo. at 176-179 and Exhibit P-12 of Brown depo.). The bonus program for 1992 (the last full year of Brown's employment with SMG) worked as follows. Brown's annual base salary of $170,000 was multiplied by 41.6% to compute the *maximum* bonus for which Brown was eligible; that amount was $70,720 (Brown depo. at 179-183 and Exhibit P-12 of Brown depo.). Brown was automatically entitled to receive 70% of this sum, or $49,504; this was known as the "quantitative portion" of the bonus and there was no discretion involved in awarding this part (Brown depo. at 180-183). Thus, there is no dispute that SMG was *contractually obligated to* pay Brown a bonus of at least $49,504 for 1992 (Brown depo. at 180-183 and Exhibit P-12 of Brown depo.). The remaining 30% of the amount for which Brown was eligible, or $21,216, was known as the "qualitative portion" of the bonus (Brown depo. at 179-183). This sum, which is computed by multiplying 41.6% of Brown's annual base salary by .30, was discretionary; in other words, Brown could have been awarded *up to* $21,216 as his "qualitative" bonus for 1992 (Brown depo. at 182-183). Accordingly, the *maximum* total bonus for which Brown was eligible was $70,720; SMG was *obligated* to pay him $49,504

as his "quantitative" bonus, and it could have paid him as much as $21,216 for his "qualitative" bonus (Brown depo. at 176183 and Exhibit P-12 of Brown depo.). The "qualitative" portion of the bonus was to be based upon the employee's individual performance (Brown depo. at 188-190).

Shortly after he was terminated by SMG, Brown was advised by SMG that he would be receiving a *total bonus* for 1992 in the amount of $50,000 (Brown depo. at 183). This amount was $20,720 below the maximum bonus for which he was eligible. Thus, since SMG was *obligated* to pay Brown a "quantitative" bonus of $49,504, it decided to give him a "qualitative" bonus of only $500 (Brown depo. at 188-190). However, Brown should have received the maximum "qualitative" bonus of $21,216 based upon his outstanding performance in 1992. As he testified:

> "[H]aving served in a dual role for seven months as the chief operating officer for the company, having successfully concluded a smooth transition from the dramatic departure of Mr. Tavares, maintaining the good moral of the company and while so doing, acquiring two new accounts during that period of time, negotiating a renewal in Pittsburgh that resulted in four times the amount of money we had previously made the previous year, it would seem to me that if there was ever a justification for someone being awarded a full qualitative bonus, I don't know who else would have been justified in receiving that if it wasn't me."

(Brown depo. at 189-190). Accordingly, based upon his and SMG's performance in 1992, Brown should have been awarded the *maximum bonus* of $70,720 ($49.504 for the quantitative portion and $21,216 for the qualitative portion) (Brown depo. at 294-296).

However, SMG decided to award Brown a *total bonus* for 1992 of only $50,000, $49,504 of which it was contractually obligated to pay him (Brown depo. at 183, 188-190, 294-296).

Moreover, SMG has not even paid Brown the "quantitative" portion of his 1992 bonus (just under $50,000), even though it was required to pay him that amount and Matthews confirmed in a letter to Roscetti dated April 27, 1993 that "SMG fully intends to pay Mr. Brown...the 'quantitative' portion of his 1992 bonus (representing, I think we agree, approximately 70% of the total package)..." Exhibit 12 at p. 2. Brown stated in his deposition: "I have yet to receive that $50,000 bonus, despite the fact that you [Mr. Matthews) wrote to my counsel indicating that there was an obligation for SMG to pay that and that they would pay that" (Brown depo. at 338-339).

Thus, there can be no question whatsoever that SMG still owes Brown a "quantitative" bonus of $49,504 for 1992. (For the reasons stated above, Brown is also owed a "qualitative" bonus of $21,216.) Indeed, SMG even reported a bonus of $50,000 on a paycheck it issued to Brown for the period ending March 31, 1993, and taxes were withheld as if that sum had actually been paid to Brown (Brown depo. at 337-339). Included in the Appendix, as Exhibit 13, is a copy

of the paycheck Brown received from SMG for that period, confirming that the $50,000 bonus was reported as income and that taxes were withheld from that alleged payment. However, Brown never received this $50,000 payment (Brown depo. at 337-339). As he explained: "My taxation from SMG reflected calculations that a $50,000 payment has been accounted for and in taking out my annual Social Security tax, yet I haven't received $50,000" (Brown depo. at 338).

Accordingly, there are no genuine issues of material fact as to whether Plaintiff is entitled to be paid a bonus for 1992. Indeed, SMG has admitted that it owes Plaintiff at least $50,000 in bonus money for 1992, having reported that amount on Brown's paycheck and deducted taxes as if that payment had been made. For the reasons stated above, SMG owes Brown an additional $20,720 in bonus money for 1992. Brown is therefore entitled to summary judgment against SMG in the amount of $70,720 for his unpaid 1992 bonus.[8]

E. Facts Entitling Brown to Summary Judgment on His Claim Against SMG for an Unpaid Commission for the "Long Beach" Project in the Amount of $837,095

Brown is also claiming that SMG owes him a commission for the "Long Beach' project in the amount of

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[8] Alternatively, the Court should grant summary judgment against SMG in the amount of $50,000 without prejudice to Brown's right to pursue a claim for an additional $20,720 in bonus money.

$837,095, and has improperly refused to pay this commission, or any part thereof. The unrebutted testimony of Brown and Webb and documents of SMG reveal that there are no genuine issues of material fact on this claim either, and that Brown is therefore entitled to summary judgment.

Beginning in 1989, SMG began to develop a formal commission program for employees who engaged in sales functions (Brown depo. at 198, 269). The program was implemented in 1990 (Brown depo. at 198). As a member of SMG's executive committee, Brown participated in the development and implementation of this program. Webb was also intimately involved in establishing the program. He said the purpose of the program was "to reward people who secured additional business, either by way of new contracts, acquisitions or contract extensions on behalf of the company" Webb depo. at 57). In

* * *

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPECTACOR MANAGEMENT GROUP,
Plaintiff,

v.

MATTHEW G. BROWN,
Defendant/Counterclaimant.

CIVIL ACTION
NO. 93-5246

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT/ COUNTERCLAIMANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT ON THE COUNTERCLAIM

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* * *

Vent and others with Mr. Brown's performance (Gibson Affidavit ¶4; Vent Affidavit ¶4).

At the time of his termination, Mr. Gibson told Mr. Brown that it was the Company's intention to negotiate a severance package with him based upon the parties' longstanding discussions concerning a one year severance period in exchange for a one year non-compete (Gibson Affidavit ¶5). Mr. Gibson told Mr. Brown to have his counsel, Mr. Roscetti, negotiate with the Company's counsel, Mr. Whiteside, with respect to the specific terms of the "package", but also agreed with Mr. Brown that, since it was their mutual expectation that the essential terms of such an agreement would include one year's base salary (at the then-applicable rate of $170,000) and medical benefits, SMG would continue his pay and medical insurance coverage without interruption while the remaining details were negotiated (Gibson Affidavit ¶5). The conduct of those negotiations (which, as evidenced by this lawsuit, were unsuccessful) is detailed below.

2. The SMG Executive Annual Incentive Plan and Mr. Brown's Claim Concerning his 1992 Bonus

Mr. Brown participated in SMG's "Executive Annual

Incentive Plan" (Brown Dep. Tr. at 176-79; Exhibit "Q"),[15] under which he had an overall 1992. bonus "guideline" equal to 35% of his annual salary (Brown Dep. Tr. at 180-81; Exhibit "Q"). At his 1992 salary of $170,000, this represents a "guideline" bonus of $59,500 ($170,000 x .35). The overall "actual" bonus can range from 25% to 130% of the "guideline" depending upon the Company's actual performance relative to its budgeted net operating income target: The minimum bonus of 25% of "guideline" is payable if the Company is at 90% of the budgeted income result, the "guideline" is payable if budget is met and the maximum bonus of 130% of guideline is payable if the Company reaches 110% of the net operating income budget (Brown Dep. Tr. at 181-83; Exhibit "Q"). In other words, for every one percent by which the Company exceeds its net operating income budget, the overall "actual" bonus for an Executive Vice President can increase another three percent of salary to the stated maximum. In 1992, the Company's budgeted net operating income was $8.078 million and its result was $8.248 million, or 102% of budget (Gibson Affidavit ¶10). Thus, Mr. Brown's overall bonus "guideline" increases by another six percent of salary to $69,700 ($170,000 x .41).[16]

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[15] A true and correct copy of SMG's Executive Annual Incentive Plan for 1992, identified by Mr. Brown at his deposition (Brown Dep. Tr. at 179), is contained in the Appendix to this Memorandum as Exhibit "Q".

[16] As far as SMG can ascertain, the only dispute between the parties to this point is Mr. Brown's contention that SMG received an additional $250,000 in revenue in December 1992 which it improperly failed to "book" until January 1993 and

Beyond that, the "overall" bonus is divided into two parts: "a financial component representing 70% of the overall [bonus] and a discretionary individual performance component representing the remaining 30% of the total [bonus]" (Exhibit "Q"; see Brown Dep. Tr. at 182-83). In Mr. Brown's case for 1992, this means a "financial component" of $48,790 and a "discretionary individual performance component" of $20,910 ($69,700 x .70 and .30, respectively). Once again, the Plan document itself provides explicitly that the "financial component" is payable simply upon attainment of the required financial results, while the "discretionary individual performance component" is just what it says it is: ,,discretionary" with the Compensation Committee of the Board, based upon the recommendation of the supervisor (Exhibit "Q").

Further, the Plan document is equally clear concerning the treatment of employees, such as Mr. Brown, who leave employment after the close of a year but before bonuses are calculated and paid:

> "An executive whose employment terminates after the close of the bonus year but before awards are paid will be eligible to receive any award attained under the payout formula of the

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that, if this revenue was included, the net operating income would increase by that amount and his "overall" bonus figure would increase to $70,720, a difference of $1,020.00 (Counterclaim ¶39; Brown Dep. Tr. at 183-85). It is undisputed that all of the other eligible executive had their bonuses calculated based upon the same figures as did Mr. Brown (Gibson Affidavit ¶10).

> financial portion of the Plan. Any bonus awards for personal achievement in the case of such terminations may be payable at the discretion of the President."

(Exhibit "Q" at 2) (emphasis added). In fact, since the institution of the Executive Annual Incentive Program, no terminated executive has ever received the "discretionary" component of the previous years' bonus (Gibson Affidavit ¶ 10; Vent Affidavit ¶ 5).

Following Mr. Brown's termination, Mr. Gibson made his bonus recommendations to the Compensation Committee of the Board, proposing a bonus for Mr. Brown of $50,000 (Gibson Affidavit ¶10; Exhibit "R").[17] This bonus exceeds both Mr. Brown's entitlement under the "financial component" of the plan (even under Mr. Brown's calculation) and the "overall" bonus paid to every other senior officer of the Company (Gibson Affidavit ¶10; Exhibit "R"). This bonus has been credited by the Company to Mr. Brown and, appropriate payroll taxes have been withheld (Brown Dep. Tr. at 337-39). SMG has, however, withheld the net proceeds of the bonus as a set-off against the sums owed it by Mr. Brown (Gibson Affidavit ¶10).

The only purported "fact" offered by Mr. Brown in

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[17] A true and correct copy of a March 4, 1993 Memorandum from Mr. Gibson to the Compensation Committee, and identified by Mr. Gibson (Gibson Affidavit ¶ 10), is contained in the Appendix to this Memorandum as Exhibit "R".

support of his claim of contractual entitlement to the "discretionary" portion of his bonus is his own, personal opinion that

> "it would seem to me that if there was ever a justification for someone being awarded a full qualitative bonus, I don't know who else would have been justified in receiving that if it wasn't me."

(Brown Dep. Tr. at 189-90). The legal materiality of this unshared opinion is argued below.

3. The "Long Beach Project" and Mr. Brown's Claim for an $837,095 "Sales Commission"

There exist a host of facts, some disputed and some undisputed, concerning the "Long Beach Project" and Mr. Brown's claim of entitlement to a "sales commission" for his work on it. Because of the at best facile and at worst disingenuous

* * *

4. Mr. Brown's Claims for Unpaid Vacation and Unreimbursed Expenses

SMG agrees that, at or about the time of his termination, Mr. Brown sought reimbursement for $550 in business expenses which, if properly incurred and documented and timely submitted, would be eligible for

reimbursement under SMG policies (Brown Affidavit ¶¶ 5 & 6; Gibson Affidavit ¶ 9(a)).[26] The problem is that the bulk of the expenditures for which reimbursement is sought were incurred as much as a year prior to the submission of the request for reimbursement and Mr. Gibson declined to approve their payment on that basis (Gibson Affidavit ¶ 9 (a)) .

SMG further agrees that, at the time of his termination, Mr. Brown had a total of 24 unused vacation days and that, at his then-applicable rate of pay, those 24 days represented "gross pay" of $15,692.30 (Brown Affidavit ¶ 2-4; Gibson Affidavit ¶ 9(b)). Obviously (or, perhaps, subject to judicial notice), that "gross" amount is subject to payroll withholding and the "net" due Mr. Brown would be somewhat less. More to the point, however, is that, as with the case of the net amount of the "financial component" of the 1992 year-end bonus, this amount has been withheld by SMG as a set-off against the amounts owing from Mr. Brown (Gibson Affidavit ¶ 9(b)).

Having said this, SMG hastens to assure the Court that, if these were the only two issues between the parties, they would ceased being issues long ago.

* * *

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[26] The Supplemental Affidavit of Mr. Brown is contained in the Appendix to his Memorandum as Exhibit 8.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPECTACOR MANAGEMENT GROUP,
Plaintiff,

v.

MATTHEW G. BROWN,
Defendant-Counterclaimant

CIVIL ACTION
NO. 93-5246

DEFENDANT-COUNTERCLAIMANT MATTHEW G. BROWN'S MOTION FOR SANCTIONS PURSUANT TO FED. R. CIV. P. 11

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Spectacor Management Group v. Matthew Brown
No. 93-5246

DATED: August 26, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPECTACOR MANAGEMENT GROUP,
Plaintiff

MATTHEW G. BROWN,
Defendant-Counterclaimant.

CIVIL ACTION
NO. 93-5246

DEFENDANT-COUNTERCLAIMANT MATTHEW G. BROWN'S MOTION FOR SANCTIONS PURSUANT TO FED.R.CIV. P. 11

Defendant-Counterclaimant, Matthew G. Brown ("Brown"), by its undersigned attorneys, respectfully moves this Honorable Court, pursuant to Rule 11 of the Federal Rules of Civil Procedure, for the imposition of sanctions against the Plaintiff, Spectacor Management Group ("SMG") and/or its attorneys, for the reasons set forth in the attached Memorandum of Law. In particular, Brown respectfully moves for an Order; (1) striking SMG's Complaint from the record; (2) directing SMG and/or its attorneys to pay the reasonable attorneys' fees and costs incurred by Brown as a direct result of the Rule 11 violations specified in the attached Memorandum of Law; and (3) granting whatever other relief that is appropriate.

In support of this Motion, Brown relies upon the attached Memorandum of Law and the exhibits submitted herewith.

Respectfully submitted,

/s/_____
GARY GREEN
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Spectacor Management Group v. Matthew Brown
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPECTACOR MANAGEMENT GROUP;
Plaintiff

v.

MATTHEW G. BROWN,
Defendant-Counterclaimant

CIVIL ACTION
NO. 93-5246

DEFENDANT-COUNTERCLAIMANT MATTHEW G. BROWN'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SANCTIONS PURSUANT TO FED. R.CIV. P.11

I. INTRODUCTION

This motion is being filed to remedy an egregious Rule 11 violation stemming from the filing of a Complaint which the plaintiff and its counsel must have believed was not well grounded in fact or law, and which was filed to harass the defendant and increase his litigation costs, and in spite of the fact that plaintiff and its counsel knew the claim did not come close to satisfying the amount in controversy requirement for federal jurisdiction.

Spectacor Management Group v. Matthew Brown
No. 93-5246

Defendant-Counterclaimant, Matthew G. Brown ("Brown"), was employed by Plaintiff, Spectacor Management Group ("SMG"), until January 31, 1993, when Brown was discharged by SMG. At the time of his termination, Brown was SMG's Executive Vice President of Operations and Chief Operating Officer.

Following his termination from SMG, Brown, through his former counsel, and SMG, through its counsel, engaged in negotiations relative to a possible settlement of all claims between the parties arising from Brown's termination. These negotiations were conducted from January, 1993 until May, 1993, at which point an impasse was reached. During this period, SMG kept Brown on its payroll at his regular salary and paid his health insurance premiums. SMG continued paying Brown's salary for three months following his termination (until the end of April, 1993), paying him a total of $42,500.00. SMG continued to provide Brown with health insurance benefits until October, 1993; its health insurance premium payments for Brown following his termination amounted to $4,921.00.

SMG commenced this action by filing a Complaint against Brown, based on diversity jurisdiction, on October 1, 1993. The action sought reimbursement from Brown, under a breach of contract theory, of the salary and health insurance payments SMG had made following Brown's termination. The Complaint alleged that Brown had agreed to reimburse SMG for all salary payments it made to him and all health insurance premiums it made on his behalf following his termination, if the parties could not reach a global settlement The Complaint specifically averred, at paragraphs 10 agreement. and 11:

> "10. At Brown's request and as a demonstration of its good faith and subject to reimbursement if agreement was not reached on all issues, following the termination, SMG continued to pay Brown his salary and provide him with medical insurance benefits as an advance against the overall settlement then being negotiated.
>
> 11. Pursuant to this arrangement, SMG made salary advances totaling $42,501.00, paid health insurance premiums totaling at least $4,921.04, and incurred payroll tax liabilities on the salary advances totaling at least $3,287.21 ."

The suit went on to allege that when negotiations between SMG and Brown failed to produce an agreement on all issues, SMG ceased any further "salary advances" and health insurance premium payments, and Brown had failed to refund or return to SMG any of the said salary advances, health insurance premium payments or payroll tax payments. This failure, SMG pied, constituted a breach of contract entitling SMG to recover from Brown, an individual of diverse citizenship from SMG, the sum of $50,710.00.

In his Answer to the Complaint, Brown denied SMG's material allegations, alleging that the salary and health insurance benefits he had received from SMG following his termination were provided pursuant to a longstanding agreement between the parties which obligated SMG to continue his salary and health insurance benefits for one year

following his termination. Brown alleged also that: (1) SMG had made these post-termination payments voluntarily, pursuant to the prior agreement; (2) he had never agreed nor was he required to reimburse SMG for these payments if a settlement agreement was not reached; and (3) SMG had breached a contract with him by wrongfully discontinuing the severance payments less than one year following his termination.

Brown also asserted a Counterclaim against SMG in which he sought to recover, inter alia, the amount of $127,500.00, representing the difference between the salary continuation payments SMG had made to him following his termination ($42,500.00) and his annual base salary at the time of his termination ($170,000.00). Brown averred that SMG had improperly cut off his severance payments three months after his discharge date when these payments should have been continued for an additional nine months pursuant to the prior agreement of the parties. The Counterclaim alleged further that SMG had improperly ceased paying Brown's health insurance premiums less than one year after his termination date.

The Counterclaim alleged also that another aspect of Brown's employment agreement with SMG was a formal annual bonus program that SMG offered to certain executives. Brown averred that, pursuant to his agreement with SMG and the SMG bonus program, he was entitled to be paid a bonus of $70,720.00 for his and SMG's performance in 1992, but that SMG had wrongfully failed to pay him this bonus or any portion of it.

Brown alleged further in his Counterclaim that SMG had breached its agreement to pay him for all unused vacation time he had accrued as of his termination date. He averred that he had accrued 24 days of vacation pay, thereby entitling him to $15,692.00 in vacation pay.

The Counterclaim went on to allege that pursuant to the policies and practices of SMG and a specific agreement he had with the company, Brown had performed the role of "salesperson" in connection with a particularly difficult and time-consuming project known as "Long Beach". Brown averred that as a result of his efforts, this project was a huge financial windfall for SMG, and that he was promised and entitled to the same commission that would have been paid to a salesperson for this project. Brown alleged that pursuant to SMG's commission structure and a specific agreement he had with SMG pertaining to the Long Beach project, he should have been paid a commission of $837,095.00 for this project, but SMG breached its promise and the contract by refusing to pay him this commission or any part of it.

The filing by SMG of its Complaint in this Court placed Brown in the position of having to assert his Counterclaim in this forum. Brown would not have sued SMG in Federal Court but for the filing by SMG of its Complaint against him.

On June 9, 1994, Brown filed a Motion for Summary Judgment. In his motion and supporting brief, Brown requested summary judgment on SMG's claim against him for breach of contract, as well as on all of the claims he had asserted against SMG in his Counterclaim. The Motion for

Summary Judgment is presently pending before this Court. In the motion and brief, Brown argued, inter alia, that there were no factual or legal disputes whatsoever that SMG owed him: (1) a bonus of at least $50,000.00 for 1992; and (2) vacation pay amounting to $15,692.00. As Brown showed in his motion, SMG had conceded it owed him these amounts, but had still not paid him.

On July 22, 1994, SMG filed a brief in opposition to Brown's Motion for Summary Judgment, as well as a Cross-Motion for Summary Judgment on the Counterclaim. Based on certain statements SMG made in this brief and the contents of an affidavit of Thomas Gibson, SMG's former President and CEO which was submitted in support of the brief and cross-motion, SMG and its counsel had to have violated Fed. R. Civ. P. 11 blatantly by suing Brown. In response to Brown's request for summary judgment on his claims for the $50,000.00 bonus and the $15,692.00 in vacation pay, SMG, and its counsel, stated in this July 22 submission that although Brown had earned the $50,000.00 bonus and the $15,692.00 in vacation pay, SMG had unilaterally decided to withhold these sums (net of taxes) from Brown as a set-off against the sums SMG contended Brown had owed it. In other words, SMG stated in its brief and the Gibson affidavit, since Brown had failed to return or refund the "salary advances" and health insurance payments totaling approximately $50,000.00 he had received from SMG following his termination, but SMG owed Brown the gross sum of $65,692.00 in bonus and vacation pay, SMG had decided to keep all of Brown's bonus money and vacation pay "as a set-off against the amounts owing from Mr. Brown". Even more significantly, SMG admitted in its brief filed on July 22 and the Gibson affidavit that it had

decided to withhold the amounts due Brown (as a set-off) long before the Complaint was filed in this action. Thus, under their view and theory of this case, at the time this action was commenced, SMG and its counsel must have believed that Brown actually owed SMG nothing, or at most, a few thousand dollars. In either case, any reasonable investigation prior to the fling and signing of the Complaint would have revealed that SMG could not come close to satisfying the $50,000.00 amount in controversy requirement for federal jurisdiction.[1]

Rule 11 provides, in substance that an attorney who signs and files a pleading is certifying that to the best of his knowledge, information and belief, formed after reasonable inquiry, the pleading is not being presented for an improper purpose (such as to harass or cause needless increase in the

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[1] Even if SMG is contending that the sums it withheld from Brown (after taxes) were less than the $50,000.00 that it claims Brown owed, the difference could only be several thousand dollars, which is the most SMG could claim it is owed under its theory of the case.

To be sure, Brown disputes that SMG was entitled to a set-off or that he agreed or was required to reimburse $MG for the sums it paid him following his termination. The point is, under SMG's view of the case, and based on its recent admission that it withheld the bonus money and vacation pay from Brown as a set-off, it had absolutely no right to bring an action against Brown in Federal Court, and as it will be shown, Rule 11 was violated flagrantly when the Complaint was signed and filed.

cost of litigation), and the factual allegations and legal claims contained in the pleading are supportable and warranted. Brown will demonstrate in this submission that: (1) Rule 11 was violated when the Complaint was signed and filed since SMG and its counsel must have believed at that time that Brown owed SMG virtually nothing, and therefore, they knew there was no diversity jurisdiction; and (2) the Rule 11 violation was compounded because the Complaint was filed as a "preemptive strike-suit" to harass Brown and cause him to incur needless expense, because he had threatened to sue SMG. To remedy these Rule 11 violations, Brown seeks an order striking the Complaint and imposing monetary sanctions against SMG and its counsel. Since Brown has incurred substantial attorney's fees defending this action, and in pressing his compulsory Counterclaim, he is specifically requesting, pursuant to Rule 11(c)(2), that SMG and its counsel be ordered to pay some or all of his attorney's fees.[2]

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[2] Brown could not have served this motion before August of 1994 because he did not learn of the Rule 11 violations until July 22, 1994, when he was served with SMG's brief and cross-motion. It was in that submission that SMG stated, for the first time, that it had kept for itself (as a set off for the salary and benefits paid to Brown) the $65,000.00 in vacation pay and bonus it admitted it owed Brown. In a letter dated August 2, 1994, Brown's counsel informed SMG's counsel of the Rule 11 violation, and requested that the Complaint be withdrawn, or alternatively, that SMG pay Brown his $50,000.00 bonus and $15,692.00 in vacation pay. SMG's counsel wrote back to Brown's counsel on August 4, 1994, stating that SMG would neither withdraw the Complaint nor pay Brown any money pending the outcome of this litigation. This motion is therefore timely.

II. LEGAL STANDARDS

The amended version of Rule 11, which became effective as of December 1, 1993, states, in relevant part:

> "(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, -
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> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery;...

> (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation."

The amended Rule 11 then describes the procedure that must be followed before a motion for sanctions can be filed:

> "(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected."

The Advisory Committee Notes to the 1993 amendments to Rule 11 state that the amended rule "restate[s] the provisions requiring attorneys...to conduct a reasonable inquiry into the law and facts before signing pleadings, ... and prescribing sanctions for violation of these obligations". Thus, the Advisory Notes make clear, the amended Rule 11 "continues to require litigants to 'stop-and-think' before initially making legal or factual contentions".

It is well recognized that Rule 11 imposes on a party who signs a pleading filed with the court an affirmative duty to conduct a reasonable investigation of the facts and law prior to filing. Business Guides, Inc. v. Chromatic Communications Enter., 498 U.S. 533, 543 (1991). The appearance of an attorney's signature on a pleading is tantamount to a certification that the attorney has conducted a reasonable inquiry and has determined that the pleading is well grounded. Lony v. E.I. DuPont DeNemours & Co., 935 F.2d 604, 616 (3rd Cir. 1991). Furthermore, the duty imposed by Rule 11 is subject to an objective analysis. As the Third Circuit stated in Bradgate Associates v. Fellows, Read & Associates, 999 F.2d 745, 752 (3d Cir. 1993):

> "The objective standard imposed by Rule 11 is firmly established in this circuit. We have consistently noted that the Rule 11 test is 'now an objective one of reasonableness' which seeks to discourage pleadings 'without factual foundation, even though the paper was not filed in subjective bad faith'. Lony 935 F.2d at 616; see also Lieb v. Topstone Indus. 788 F.2d 151,157 (3d Cir. 1986). We have also said that Rule 11 is designed to ensure that pleadings are not used for improper purposes such as harassment, delay or needless increase in litigation expense. Lony, 935 F.2d at 616; Lieb, 788 F.2d at 157.
>
> When a district court examines the sufficiency of the investigation of facts and law it 'is expected to avoid the wisdom of

> hindsight and should test the signer's conduct by [asking] what was reasonable to believe at the time the pleading, motion, or other paper was submitted.' CTC Imports and Exports v. Nigerian Petroleum Corp. 951 F.2d 573, 578 (3d Cir. 1991) (citing Notes of Advisory Committee on Rules, 1983 Amendment, Fed. R. Civ. P. 11)."

Significantly, in Bradgate, supra, the Third Circuit ruled that a Rule 11 violation can be found to exist where a party concealed relevant facts for the purpose of manufacturing diversity jurisdiction. Id. at 752-53. In the instant case, SMG and its counsel failed to disclose to Brown at the time the Complaint was filed, and for a long time thereafter, that SMG had deducted and kept the $65,000.00 it admittedly owed Brown as a set-off against the sums Brown had allegedly owed SMG for the salary and benefits $MG paid Brown after his termination. It recently became apparent to Brown that the purpose of SMG's concealment of the fact that it had taken Brown's $65,000.00 was to "manufacture" the $50,000.00 amount in controversy requirement for diversity jurisdiction. The recent admissions of SMG and its counsel show compellingly that they had to have believed at the time the Complaint was filed, and for many months prior thereto, that Brown owed SMG virtually nothing. Significantly, SMG did not inform Brown of the set-off until more than one year after the set-off had been taken. Under the teachings of Bradgate, a Rule 11 violation has undoubtedly occurred.

The primary purpose of Rule 11 is to discourage

pleadings that are without factual basis, even though they are not filed in subjective bad faith. Lieb v. Topstone Indus., 788 F.2d 151,157 (3d. Cir. 1986). However, Rule 11 seeks also to ensure that pleadings are not filed for an improper purpose, such as to cause harassment or needless litigation expense. Lony, supra, 935 F.2d at 616. As the Court observed in Lieb, at 788 F.2d 157:

> "Counsel's certification also warrants that the pleading is not being used for an improper purpose, such as to cause harassment, undue delay, or needless increase in litigation expense. That test, too, is an objective one. The pleader may not escape liability because he did not intend to bring about additional delay or expense. If reasonable preparatory steps would have avoided those consequences, sanctions are appropriate. 'There is no room for a pure heart, empty head defense under Rule 11 .' Schwarzer, Sanctions Under the New Federal Rule 11 - A Closer Look, 104 F.R.D. 181, 187 (1985)."

For the purpose of this motion, Rule 11 must be read in conjunction with 28 U.S.C. Sec. 1332(a) which provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between.., citizens of different States; ..." In this case, the Rule 11 violation stems from the filing of a Complaint against Brown seeking damages in excess of $50,000.00, when SMG believed, and a reasonable inquiry would have shown, that

Brown owed SMG virtually nothing. This leads to the ineluctable conclusion that the Complaint was filed against Brown for an improper purpose, i.e, to harass him, and that the factual and legal contentions alleged in the Complaint, i.e., that Brown owed SMG more than $50,000.00, were knowingly without basis or support.

III. FACTS SUPPORTING IMPOSITION OF SANCTIONS UNDER RULE 11.

To review, SMG filed its Complaint on October 1, 1993. The Complaint was signed by William A. Whiteside, Jr., Esquire, a partner in the law firm of Fox, Rothschild, O'Brien & Frankel, who are counsel of record for SMG. A copy of SMG's Complaint is attached hereto, as Exhibit "A".[3]

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[3] On May 25, 1994, Brown filed a Motion to Disqualify Mr. Whiteside and his associate, James A. Matthews, III, Esquire, whose name also appeared on the Complaint, from representing SMG in this proceeding. Brown showed in that motion that Messrs. Whiteside and Matthews could not act as counsel for SMG since they were material witnesses in the case, having conducted the settlement negotiations with Brown's former attorney Which were the subject of SMG's Complaint. Indeed, Messrs. Whiteside and Matthews had identified themselves as fact witnesses for SMG in their self-executing disclosures under Rule 26. Brown filed the Motion to Disqualify only after Messrs. Whiteside and Matthews had advised Brown's counsel that they would not withdraw from the case voluntarily. Nevertheless, SMG did not oppose the Motion to Disqualify, and on June 17, 1994, While that motion was pending, Messrs. Whiteside and Matthews withdrew their appearances as counsel for SMG and Ira B. Silverstein, Esquire, another partner in the Fox, Rothschild firm, entered his appearance

SMG's Complaint was founded solely upon a theory of breach of contract. It alleged that the Court had jurisdiction over the action pursuant to 28 U.S.C. Sec. 1332(a)(1) because the parties were of diverse citizenship and the amount in controversy, exclusive of interest and costs, exceeded $50,000.00. Exhibit "A" at para. 3. The Complaint averred, correctly, that SMG had terminated Brown's employment on January 31, 1993, and that during the month of January, 1993, the parties had commenced negotiations with respect to a possible overall settlement agreement. Exhibit "A" at paras. 7-8. It went on to allege that during these negotiations, the parties had agreed that: (1) subject to agreement on all issues, SMG would continue paying Brown's salary and medical benefits for one year following his termination; and (2) if a global agreement was not reached on all issues, Brown would reimburse SMG for all "salary advances" and health insurance benefits he received from SMG following his termination. Exhibit "A" at paras. 9-10. The Complaint further averted that, pursuant to this agreement of the parties, SMG had made

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as counsel for SMG. As a result, the Court denied the Motion to Disqualify as moot. Given their status as material witnesses, Messrs. Whiteside and Matthews should not have acted as counsel for SMG in this litigation. They did, however, and Mr. Whiteside's signing and filing of the Complaint, under the circumstances, subjected him to the requirements of Rule 11. Since Mr. Whiteside represented SMG in the pre-litigation negotiations with Brown's former counsel, and was keenly aware of the claims of the parties, he had firsthand knowledge, without even having to conduct a reasonable inquiry, that SMG had withheld the bonus and vacation pay from Brown as a set-off against what SMG was contending Brown owed it.

"salary advances" to Brown totaling $42,500.00, had paid health insurance premiums on his behalf totaling $4,921.00, and had incurred certain payroll tax liabilities on the "salary advances" amounting to $3,287.00. Exhibit "A" at para. 11. The Complaint concluded by alleging that when the negotiations failed to produce an agreement on all issues, SMG ceased any further salary advances to Brown, but that Brown had failed to refund or return to SMG the said salary advances, health insurance premiums and payroll tax payments. Exhibit 'A' at paras. 12-14. SMG alleged that Brown's failure to reimburse SMG for these sums constituted a breach of contract, thereby entitling SMG to judgment against Brown the amount of $50,710.00. Exhibit 'A' at p. 3.

Brown's Answer to the Complaint denied SMG's material allegations, and included a Counterclaim. Although Brown admitted receiving the sums alleged by SMG, he denied any obligation or agreement to return these sums to SMG. The Counterclaim alleged that Brown was entitled to a money judgment against SMG in the following amounts:

(a) $127,500.00, representing the difference between the salary continuation payments SMG had made to him following his termination ($42,500.00) and his annual base salary at the time of his termination ($170,000.00), under the theory that SMG had agreed long before his termination (independent of the severance negotiations) to provide him with one year of severance pay following his termination;

(b) The cost of replacement health insurance coverage, under the theory that SMG had wrongfully discontinued his health insurance benefits less than one year after his

termination, when it was contractually obligated to continue this coverage for one year following his termination;

(c) $70,720.00, representing the executive bonus Brown contends SMG was required to pay him based upon his and SMG's performance in 1992;

(d) $15,692.00, representing the dollar value of 24 days of vacation pay that Brown had accrued but not used as of the time of his termination; and

(e) $837,095.00, representing the amount of the commission Brown contends SMG was obligated to pay him, pursuant to a set formula and the company's policy, for his efforts and results relative to the Long Beach project.[4]

On June 9, 1994, Brown filed his Motion for Summary Judgment. In that motion, Brown demonstrated inter alia that there was no dispute between the parties that he was owed a bonus of at least $50,000.00 for 1992, and had accrued 24 days of unused vacation pay, having a value of $15,692.00, as of the time of his termination. Attached hereto, as Exhibit B, are copies of the relevant pages from Brown's brief in support of his Motion for Summary Judgment where these claims are discussed.

Regarding the bonus, although Brown contended that

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[4] The Counterclaim sought other damages as well, including $7,800.00 for unpaid auto allowance and $550.00 for unreimbursed expenses.

SMG actually owed him a bonus of $70,720.00 for 1992, he showed in his Motion for Summary Judgment that SMG conceded he had earned a bonus of $50,000.00 for 1992, and therefore, that he was at least entitled to summary judgment against SMG in the amount of $50,000.00. See, Exhibit B at pages 25-26. Indeed, SMG even reported this bonus of $50,000.00 on a paycheck it issued to Brown for the period ending March 31, 1993, and withheld taxes as if that sum had actually been paid to Brown, even though it had not. Attached hereto as Exhibit C are copies of the relevant pages from Brown's deposition pertaining to this unpaid bonus. Attached hereto as Exhibit D is a copy of the paycheck Brown received from SMG on March 31, 1993, reflecting that a $50,000.00 bonus payment was reported on that paycheck as income to Brown, and that taxes were withheld from this alleged payment. Brown testified at his deposition that he had not received this $50,000.00 bonus, even though SMG had confirmed its obligation to pay him this amount and had reported the bonus on his paycheck for March 1993. See, Exhibit C. On March 4, 1993, before this check was issued to Brown, Mr. Gibson, who at the time was SMG's President and CEO, made a recommendation to the SMG board that Brown be a awarded this $50,000.00 bonus for 1992; Gibson's recommendation was quickly approved. See, Exhibit E attached hereto.[5]

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[5] In his affidavit which was submitted by SMG in opposition to Brown's Motion for Summary Judgment, Gibson confirmed that he had recommended that Brown receive a bonus of $50,000.00, that his recommendation had been made to the SMG board on March 4, 1993, that the board had approved his recommendation, and that the $50,000.00 bonus had been credited

Regarding the issue of vacation pay, Brown showed in his Motion for Summary Judgment that there was also no dispute that SMG owed him $15,692.00 for 24 unused vacation days he had accrued as of the time of his termination. See Exhibit B at pages 2123. In his deposition, which was filed in support of his motion, Brown confirmed that he had still not received any of his vacation pay. See Exhibit C. In further support of his request for summary judgment on this claim, Brown filed a copy of a letter from SMG's Senior Vice President of Human Resources to SMG's counsel, Mr. Whiteside, dated May 6, 1993, confirming Brown's "vacation entitlement" of $15,692.30. A copy of this letter is attached hereto as Exhibit G.[6]

On July 22, 1994, SMG filed a brief in opposition to Brown's Motion for Summary Judgment and in support of its Cross-Motion for Summary Judgment. It is the statements SMG made in this brief, in response to Brown's request for summary judgment on his claims for the $50,000 bonus and $15,692.00 in vacation pay, coupled with the admissions made by Gibson in his affidavit which was filed by SMG with this brief, that alerted Brown to the Rule 11 violations he is now bringing to the Court's attention. Copies of the relevant pages from SMG's brief are attached hereto as Exhibit H, and

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but not paid to Brown. See Gibson affidavit, attached hereto as Exhibit F, at para. 10.

[6] In his affidavit filed in opposition to Brown's motion, Gibson admitted that Brown "had accrued a gross amount of $15,692.20 in unused vacation pay" as of the time of his termination. See, Exhibit F at para. 9 (b).

copies of the relevant pages of the Gibson affidavit are attached hereto as Exhibit F. Significantly, in this brief and affidavit, SMG disputed Brown's entitlement to summary judgment on the bonus and vacation pay claims. On pages 18 and 19 of its brief, SMG stated its reason for not paying Brown the $50,000.00 bonus it admits he earned for 1992. SMG stated:

> "This bonus has been credited by [SMG] to Mr. Brown and, appropriate payroll taxes have been withheld...SMG has, however, withheld the net proceeds of the bonus as a set-off against the sums owed it by Mr. Brown" (Exhibit H at page 19).

On page 33 of its brief, SMG set forth its reason for not paying Brown for the 24 unused vacation days he undisputedly had accrued as of the time of his discharge. Here, the brief stated:

> "SMG further agrees that, at the time of his termination, Mr. Brown had a total of 24 unused vacation days and that, at his then-applicable rate of pay, those 24 days represented 'gross pay' of $15,692.30... Obviously (or, perhaps, subject to judicial notice), that 'gross' amount is subject to payroll withholding and the 'net' due Mr. Brown would be somewhat less. More to the point, however, is that, as with the case of the net amount of the [$50,000] 1992 year-end bonus, this amount has been withheld by SMG

> as a set-off against the amounts owing from Mr. Brown" (Exhibit H at page 33).

In his affidavit which was submitted in support of SMG's brief, Gibson stated that although Brown had indeed earned the $50,000.00 bonus and accrued the $15,692.30 in vacation pay, Gibson had directed his subordinates to withhold these sums from Brown as a set-off against the $50,000.00 in salary advances and medical benefits SMG was contending Brown owed it. See Exhibit F at paras. 9 (b) and 10. Significantly, Gibson admitted that SMG had decided to withhold payment of this bonus and vacation pay from Brown, and to retain these sums as a set-off, long before SMG had commenced its lawsuit against Brown. Accordingly, at the time the Complaint was signed and filed, SMG must have believed that it had virtually been paid in full by Brown. Even more to the point, any reasonable inquiry by SMG's counsel prior to the filing of suit would have revealed that SMG did not believe it had a claim against Brown which came close to satisfying the $50,000.00 amount in controversy requirement. Moreover, since Mr. Whiteside personally handled and supervised the post-termination negotiations with Brown's former counsel, and was representing SMG throughout those negotiations, he must have known prior to the filing of suit that his client had deducted the monies it owed Brown as a set-off and that at least from his client's standpoint, it virtually had been made whole. In either case, any objective analysis of the facts supports the conclusion that SMG's Complaint was not well grounded in fact or law, that it manufactured a $50,000.00 claim in order to sue Brown in Federal Court, and that any reasonable pre-filing investigation by counsel would have revealed that there was no federal jurisdiction.

Accordingly, this is a case in which Rule 11 has been violated blatantly.

To reiterate, Brown disputes that SMG was entitled to a set-off or that he ever agreed or was required to reimburse SMG for the amounts it paid him following his termination. The point of this motion, however, is that under SMG's theory of the case, it had no right to bring an action against Brown, and it and its counsel violated Rule 11 by suing Brown for reimbursement of money they believed SMG had already received.

It is well recognized that the main purpose of Rule 11 is to discourage pleadings that are frivolous, legally unreasonable or without factual basis. Matthews v. Freedman, 128 F.R.D. 194, 197 (E.D.Pa. 1989), aff'd, 919 F.2d 135 (3d Cir. 1990). Here, there is a plethora of evidence to suggest that at the time the Complaint was filed, and for many months prior thereto, SMG and its counsel believed that SMG had no claim, or an insubstantial claim against Brown and that the decision to sue Brown was a retaliatory response to Brown's threat to bring an action against SMG for his Long Beach commission and the other items alleged in the Counterclaim. As further proof of these Rule 11 violations, Brown submits the following facts:

(1) Brown's official termination date was January 31, 1993. See, Exhibit A at para. 7;

(2) While counsel for the parties were negotiating a possible settlement agreement after Brown had been discharged, SMG paid Brown $42,500.00 in salary and it also

paid Brown's health insurance premiums in the amount of $4,921.00. SMG discontinued the salary payments to Brown in late April or early May of 1993;

(3) On or about March 4, 1993, the SMG board approved Brown's $50,000.00 bonus for 1992. See, Exhibits E and F. Thus, this bonus, which was something Brown was entitled to be paid separate and apart from his salary or severance pay, was approved by SMG during the period when it was continuing to pay Brown's salary;

(4) On or about March 31, 1993, SMG reported Brown's $50,000.00 bonus on his monthly post-termination paycheck, and withheld taxes as if that bonus had been paid to Brown. See Exhibits C and D. However, SMG did not actually pay this bonus, or any portion of it, to Brown. See Exhibits F and H. The reporting of this "payment" proves that SMG decided in March of 1993 to withhold Brown's bonus as a set-off against the "salary advance", and health insurance benefits it had provided to him. Significantly, this "set-off" was claimed by SMG six months before it sued Brown;[7]

(5) SMG confirmed in a letter it sent to Mr. Whiteside on May 6, 1993 (five months before SMG sued Brown) that Brown was entitled to be paid $15,692.30 in vacation pay. See Exhibit G. However, this sum was not paid to Brown

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[7] By paying the withholding taxes as if Brown had earned the $50,000.00 bonus, SMG could be seen as having paid Brown *technically*, but then before Brown received the money, SMG intercepted the $50,000.00 and paid it to itself as reimbursement.

either, further confirming SMG's decision (of which Mr. Whiteside was undoubtedly aware) well before it sued Brown to deduct Brown's vacation pay from the amounts it contended Brown owed it;

(6) As further proof that SMG and its counsel must have believed SMG had been "paid" (by way of a set-off) long before SMG sued Brown, Mr. Whiteside and his associate, Mr. Matthews, sent separate letters to Brown's former counsel in April of 1993, in which they stated that the post-termination severance payments by SMG to Brown would cease, but significantly, did not make a demand that Brown refund or return any of the monies he had already received. See Exhibit I. If SMG and its counsel truly believed that SMG had a claim against Brown for reimbursement of these sums, it is a foregone conclusion that a demand for reimbursement would have been made in these letters. The only logical inference to be drawn from the absence of any such demand is that SMG and its counsel believed that SMG had been "paid" by Brown as a result of the withholding of Brown's bonus and vacation pay;

(7) The negotiations between SMG's counsel and Brown's former counsel ended in late April or early May of 1993, with no agreement having been reached. There were no further discussions regarding settlement before SMG sued Brown on October 1, 1993. From May, 1993 until the Complaint was filed, neither SMG nor its counsel made any demand upon Brown or his counsel for a return or refund of any of the monies SMG had paid Brown following his termination, further establishing SMG's pre-litigation contention of a "washout";

(8) On September 20, 1993, Brown's present counsel, Gary Green, Esquire, sent a letter to Mr. Gibson in which he stated, inter alia, that SMG owed Brown additional severance pay, his full 1992 bonus, vacation pay and a sales commission for the Long Beach project. In his letter, Mr. Green asked SMG to respond within two weeks if it was interested in exploring settlement. A copy of Mr. Green's letter is attached hereto as Exhibit J. This was the first correspondence between Mr. Green and SMG;

(9) SMG responded to Mr. Green's letter of September 20, 1993 by filing suit against Brown on October 1, 1993. In a letter he wrote to Mr. Green dated October 1, 1993, Mr. Whiteside stated that Mr. Green's letter to Mr. Gibson had been referred to him and that "we have advised [SMG] that it makes no sense at all to do anything at all other than to file suit against Mr. Brown for reimbursement of what has been paid out to him and on his behalf; and we have done that". A copy of Mr. Whiteside's letter is attached hereto as Exhibit K. Mr. Whiteside did not contact Mr. Green before he sent this letter or filed the Complaint. Under the circumstances, this was obviously a preemptive suit designed to harass Brown because he had threatened to sue SMG; such suits are violative of Rule 11. Project 74 Allentown, Inc. v. Frost, 143 F.R.D 77, 89 (E.D. Pa. 1992);

(10) As further proof of the Rule 11 violation, SMG did not allege in its Complaint that it had demanded reimbursement from Brown of the sums alleged in the Complaint. See Exhibit A. Presumably, the absence of such an allegation was due to the fact that SMG and its counsel believed prior to the filing of suit that SMG had been made

whole as a result of the set-off it took.

Under the circumstances, there has been an egregious violation of Rule 11 because when SMG sued Brown, it and its counsel must have believed that SMG had no claim against Brown, or if it did have a claim, its value was nowhere close to $50,000.00. At the very least, a reasonable pre-filing investigation by SMG's counsel would have revealed that the Complaint, at least from SMG's point of view, was without basis or foundation in fact or law and was designed to harass and annoy Brown and increase his litigation costs. For these reasons, Rule 11 was plainly violated when SMG's Complaint was signed and filed. See, e.g., Business Guides, supra (Rule 11 violated where signing of pleading was unreasonable under the circumstances); Project 74 Allentown, supra (in assessing Rule 11 violation, objective reasonableness of the signing, rather than subjective intent or belief of the signer, governs).[8]

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[8] On August 9, 1994, pursuant to this Court's Order, Brown's counsel deposed Mr. Whiteside, who was represented at the deposition by his partner, Mr. Silverstein. When Brown's counsel questioned Mr. Whiteside concerning the alleged Rule 11 violation, Mr. Silverstein instructed Mr. Whiteside not to answer. Attached hereto, as Exhibit L, are copies of the relevant pages from Mr. Whiteside's deposition. The record shows that Mr. Whiteside was directed not to answer questions dealing with whether he knew at the time the Complaint was signed and filed that SMG had no claim against Brown because it had deducted the monies it owed him as a set-off. These instructions were given to Mr. Whiteside even though Messrs. Silverstein and Whiteside were aware from Brown's counsel's letter dated August 2, 1994, that Brown was contending $MG and its attorneys had violated Rule 11 by filing a

IV. THE FORM OF SANCTIONS THAT SHOULD BE IMPOSED

Regarding sanctions, Rule 11 provides, in pertinent part:

> (1) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.
>
> (A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2)...
>
> (3) Order. When imposing sanctions, the court shall describe the conduct determined

---

frivolous lawsuit against him. Notwithstanding the obstructionist tactics of SMG's counsel, there is ample evidence in the record from which a Rule 11 violation can be found.

> to constitute a violation of this rule and explain the basis for the sanction imposed.

The rule states further that where there has been a proven violation, the court may "impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation." See Rule 11(c).

The Advisory Committee Notes of the amended Rule 11 state that "[a]bsent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under [the rule], one of its partners, associates, or employees is determined to have violated the rule". These Notes go on to state that this is because a motion under Rule 11 can "be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion", and therefore, "it is appropriate that the law firm ordinarily be viewed as jointly responsible [with the individual attorney] under established principles of agency". It is also well recognized that a monetary sanction imposed under Rule 11 for bringing a frivolous action can be divided equally between the plaintiff and its counsel. Eastway Construction Corp. v. New York, 821 F.2d 121 (2d Cir. 1987). See also, Kenna v. U.S. Department of Justice, 128 F.R.D. 172, 177 (D.N.H. 1989) (court has considerable discretion in determining how liability for Rule 11 violation should be allocated between party and his attorney); Muthing v. Brant Point Nantucket, 838 F.2d 600, 607 (1st Cir. 1988). "Shared responsibility [for a Rule 11 sanction] should also attach to a party who permits the assertion of a claim that such party reasonably should have known to be groundless". Kenna, supra, at 177-78.

Furthermore, since SMG is an entity which can only act through its agents or employees, Rule 11 sanctions can be imposed on it as a result of Mr. Whiteside's signing of the Complaint, or failure to make the appropriate pre-filing investigation. Business Guides v. Chromatic Communications Enter., supra, 498 U.S. at 547-48. In the instant case, the monetary sanction Brown is requesting should be allocated between SMG and its counsel since both are responsible for the filing of an action which they believed was without factual foundation.[9]

Brown's counsel gave SMG and its counsel every reasonable opportunity to avoid having to respond to a formal Rule 11 Motion. On August 2, 1994, Brown's counsel wrote to Mr. Silverstein to alert him and SMG to the Rule 11 violation that had become apparent to Brown from the brief and affidavits SMG filed with the Court on July 22, 1994. A copy of this letter is attached hereto as Exhibit M. In this letter, Brown°s counsel described the Rule 11 violation, and offered the following proposal to remedy it:

> "To remedy this violation of Rule 11, Mr. Brown demands that SMG withdraw its action and that SMG pay Mr. Brown's expenses

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[9] To the extent the Court determines that subdivision (b)(2) of Rule 11 has been violated, any monetary sanction for that violation should be imposed upon SMG's counsel, and not SMG. See, Rule 11 (2)(A). If however the Court finds that any other part of subdivision (b) of the rule was violated, any monetary sanction should be allocated between SMG and its counsel.

> including attorney's fees incurred in connection with defending this action. If the Complaint is not withdrawn within 15 days, we will follow the procedure set forth in Rule 11.
>
> Alternatively, we demand that SMG withdraw its opposition to Mr. Brown's Motion for Summary Judgment on his claims for the $50,000. bonus SMG admits he earned for 1992 and the $15,692.30 in vacation pay, and that it pay to Mr. Brown, within 15 days, these amounts together with interest."

Mr. Silverstein wrote back to Brown's counsel on August 4, 1994, stating that "1 see no Rule 11 violation and we will neither withdraw our Complaint, pay your legal fees and costs or consent to the entry of judgment on any aspect of your claims..." A copy of this letter is attached hereto as Exhibit N.

As a result of Mr. Silverstein's letter, Brown's counsel decided to follow the formal procedure outlined in Rule 11. This motion will be filed with the Court if, within 21 days after service of the motion, SMG still refuses to withdraw its Complaint against Brown, or alternatively, to pay Brown the $50,000.00 bonus and $15,692.30 in vacation pay.

If SMG refuses to correct the Rule 11 violation within the "safe harbor"' period provided by the amended Rule 11, and thereby forces Brown to file this motion, Brown will seek as appropriate sanctions under Rule 11, an order: (a) striking the Complaint; and (b) directing SMG and/or its counsel to

pay Brown "some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation".

As the Advisory Committee Notes to the 1993 amendments to Rule 11 state, "[t]he court has available a variety of possible sanctions to impose for violations", one of which is "stalking the offending paper"' and another of which is an award of counsel fees. Since SMG and its counsel must have believed at the time the Complaint was filed, and any reasonable pre-filing investigation would have revealed that the Complaint, at least as far as SMG was concerned, was without foundation in fact or law, an order striking the Complaint from the record is certainly appropriate. Regarding monetary sanctions, the Advisory Committee Notes provide that in determining the propriety of such a sanction, the court should consider, inter alia, whether the violation "infected the entire pleading", "whether it was intended to injure; [and] what effect it had on the litigation process in time or expense;..." The amended Rule 11 expressly states that the court may award the movant reasonable attorneys' fees and expenses to remedy the violation. See, Rule 11 (2).

In the instant case, an award of attorneys' fees and costs to Brown is necessary and appropriate to redress the proven violation of Rule 11. Here, the violation "infected the entire in pleading" in that under SMG's and its counsel's theory of the case, SMG had no claim against Brown, or at most, a claim that did not come close to meeting the $50,000.00 amount in controversy requirement. Furthermore, and more significantly, Brown was prejudiced by the Rule 11 violation because he would not have sued SMG in Federal Court but for the filing of SMG's Complaint against him,

which put him in a position of having to defend this frivolous action and at the same time having to assert his Counterclaim in this forum. Brown has already incurred substantial legal fees and costs in connection with defending this action, and therefore, SMG and its attorneys should be ordered to pay some or all of these fees and expenses. If the Court grants this motion, Brown will request permission to submit an affidavit setting forth the fees and costs he has incurred and paid as a result of having to defend this lawsuit, so that the Court will have an adequate record upon which to base an order fixing the amount of fees and costs to remedy the Rule 11 violation.[10]

V. CONCLUSION

For all of the foregoing reasons, Brown respectfully requests that this Honorable Court grant his motion and, to remedy the Rule 11 violation, impose sanctions against SMG and its counsel pursuant to Rule 11.

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[10] To review, the record reveals compellingly that SMG filed its action against Brown as a preemptive suit in response to Brown's counsel's letter to SMG dated September 20, 1993. That letter invited SMG to further explore settlement with Brown, but SMG and its counsel declined the invitation and decided to sue Brown for money it believed it had already been paid. If SMG had not filed its "strike-suit" against Brown, the parties could have continued exploring the possibility of an overall settlement agreement, and if those negotiations had not been fruitful, Brown may not yet have sued SMG. Even if Brown had decided to sue, however, his choice of forum would have been the state court.

Spectacor Management Group v. Matthew Brown
No. 93-5246

Respectfully submitted,

/s/_____
GARY GREEN
ROBERT A. DAVITCH

OF COUNSEL

SIDKOFF, PINCUS & GREEN, P.C.
12th Floor, 530 Walnut Street
Philadelphia, Pennsylvania 19106
(215) 574-0600

DATED: August 26, 1994

Spectacor Management Group v. Matthew Brown
No. 93-5246

COPY OF PAYCHECK TO BROWN FROM SMG, DATED 3/31/93

SPECTACOR MANAGEMENT GROUP
Philadelphia, PA

NAME	PAY PERIOD	PAY DATE
Brown, Matthew G.	Ending 3/31/93	3/31/93

SPECTACOR MANAGEMENT GROUP
701 Market Street
Philadelphia, PA 19106

To The Account Of: **MATTHEW G. BROWN**
7 WETHERSFIELD DR
MEDFORD NJ

Account Number	Amount
3113018	**********9,317.87

Spectacor Management Group v. Matthew Brown
No. 93-5246

INTER-OFFICE MEMORANDUM

TO: RICHARD SCHULZE
FRED SHABEL
DICK VENT

FROM: TOM GIBSON

DATE: MARCH 4, 1993

RE: 1992 OFFICER BONUSES

This is a follow-up to my January 14, 1993 memo regarding 1992 bonuses recommendations for my direct reports. As we discussed at that time, I would wait until we had the audited results to finalize officer bonuses. Coopers has now completed the audit for 1992 showing a profit of $8,248 million or 102% of the $8,078 budget. This is a slight increase from the year end flash report of $8.173 million or 101.2% of budget shown in the January 14th memo. Based on the audit results, the following is my recommendation for 1992 bonuses.

	1/14/93 Memo	Final Recommendation
Matt Brown	$48,900	$50,000
Wes Westley	41,962	44,000
Mich Sauers	39,838	41,000
Maureen Ginty	20,981	22,000

With your concurrence, I would like to announce bonuses late next week.

Thank you.

/S/_____
Tom Gibson

Spectacor Management Group v. Matthew Brown
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EXHIBIT "A"

COMMONWEALTH OF PENNSYLVANIA :
: SS
COUNTY OF PHILADELPHIA :

AFFIDAVIT

THOMAS R. GIBSON, being duly sworn according to law, deposes and says:

1. From July 24, 1992 until February 28, 1994, I was employed by Spectacor Management Group ("SMG" or the "Company") as its President and Chief Executive Officer. I have personal knowledge of the facts set forth in this affidavit

.

2. In its present form, SMG is a privately-held Pennsylvania Joint Venture owned equally by Spectacor, Inc. (a Philadelphia company controlled by the Edward M. Snider family), Pritzker & Pritzker (a Chicago company controlled by the Pritzker family and majority owner of Hyatt Hotels) and ARA Services, Inc. (a Philadelphia-based company well-known in the leisure services industry). SMG is in the business of managing public assembly facilities -- such as stadiums, arenas, and convention centers throughout the world.

3. At the time I was hired by the Company, Matthew G. Brown was serving as Executive Vice President and Chief Operating Officer. Richard H. Vent, a member of the Board of Directors, was serving as Managing Director and acting

Chief Executive officer. After I was hired, Mr. Brown continued in his *position* as Executive Vice President for Operations, reporting to me.

* * *

9. During the course of the severance negotiations, I also became aware that Mr. Brown claimed to be owed $550 in unreimbursed business expenses (beyond expenses for which he had been reimbursed) and $15,692.20 as payment for unused vacation time.

(a) With respect to the business expenses, I reviewed the documentation submitted by Mr. Brown in support of those expenses, concluded that a substantial portion of the expenses were "dated" in that they had been incurred more than 120 days (and, indeed, in some cases more than one year) prior to their being submitted for reimbursement and, therefore, were not eligible for reimbursement. I declined to authorize their payment on that basis. I did, however, approve a substantial amount of properly documented expenses.

(b) I also concluded that Mr. Brown had accrued a gross amount of $15,692.20 in unused vacation pay, which amount was subject to payroll withholding, but directed my subordinates to withhold payment of that amount to Mr. Brown until the matter of the salary and medical coverage advances to him in anticipation of settlement was resolved.

10. During the first quarter of 1993, I was responsible

for calculating and transmitting to the Compensation Committee of the Board of Directors my recommendations for 1992 year-end bonuses to the Company's senior officers under the SMG Executive Annual Incentive Plan. As explained in the Plan document, those bonus payments are calculated based upon a "target" percentage of the individual's annual salary. In Mr. Brown's case for 1992, that percentage was 35% of his annual salary of $170,000, for a "guideline" bonus of $59,500. This "guideline" applied to the extent that the Company met its operating income budget target for the year. In 1992, SMG's net operating income budget target was $8.087 million and its result was $8.248 million, or 102% of budget. Under the terms of the Plan, this 2% increase resulted in an increase to Mr. Brown's "overall" bonus guideline of another 6% of salary to a total of $69,700. I also note in this regard that these budget figures are the same which were used for the calculation of the 1992 year-end bonuses for all other executives of the Company and, further, are the net operating income figures used by the Company for all other financial reporting tax and business purposes. I understand that Mr. Brown has alleged that there were additional $250,000 in income allegedly improperly deferred from December, 1992 to January, 1993. I disagree. Those funds were properly recorded in 1993. In further applying the terms of the Executive Annual Incentive Plan, 70% of the overall bonus "guideline" is denominated the "Financial Component" and is deemed earned by the employee in its entirety. In Mr. Brown's case, this amounted to $48,790. The remaining 30% of the overall bonus "guideline" is denominated the ',Discretionary Component" and varies depending upon my recommendation to the Board Compensation Committee and own judgment of the individual's performance. Further, and

again in keeping with the terms of the Plan, in the case of an employee such as Mr. Brown, whose employee terminates after the close of the year but before bonus payments are made, I have the discretion to award or not award the "Discretionary Component" of the bonus. Based both upon my evaluation of Mr. Brown's performance and given the fact that I had additional discretion to deny the "Discretionary Component" because Mr. Brown's employment had terminated, I recommended to the Compensation Committee of the Board of Directors a total bonus payment to Mr. Brown of $50,000, a figure which represented his full "Financial Component" plus a few extra dollars to "round off" the figure. Before making this recommendation, I reviewed Mr. Brown's prior compensation history and noted that this proposed bonus was significantly in excess of any bonus he had ever received before and, further, was in excess of the total bonus -- that is, financial and discretionary -- which I was recommending for any of the other senior officers of the Company. I made these recommendations to the Board in a memorandum dated March 4, 1993. The document contained in the Appendix to SMG's Memorandum of Law in this matter as Exhibit "R" is a true and correct copy of that memorandum. Thereafter, this recommendation was approved by the Board, the $50,000 bonus was credited to Mr. Brown, appropriate payroll deductions were made and, again, the net proceeds were retained by SMG, at my direction, pending resolution of SMG's claims for reimbursement of salary advances made to Mr. Brown.

Spectacor Management Group v. Matthew Brown
No. 93-5246

May 6, 1993

William Whiteside, Esq.
Fox, Rothschild, O' Brien & Frankel
2000 Market Street
9th Floor
Philadelphia, PA 19103

RE: Matthew Brown

Dear Bill:

As discussed, the following is a breakdown of Matt Brown's vacation entitlement in terms of dollars:

$170,000.00	-	Yearly Salary
$ 3,269.23	-	Weekly Salary
$ 653.84	-	Daily Salary
x 24	-	# of Vacation Days
$ 15,692.20	-	Dollar Value of vacation Days

Sincerely,

/s/_____
Maureen Ginty
Sr. Vice President
Human Resources
MG/bac

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPECTACOR MANAGEMENT GROUP,
Plaintiff,

v.

MATTHEW G. BROWN,
Defendant/Counterclaimant.

CIVIL ACTION
NO. 93-5246

PLAINTIFF'S REPLY MEMORANDUM IN OPPOSITION TO DEFENDANT/COUNTERCLAIMANT'S MOTION FOR SUMMARY JUDGMENT, IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT/COUNTERCLAIMANT'S MOTION FOR SANCTIONS

I. INTRODUCTION

The Defendant/Counterclaimant Matthew G. Brown has filed a Memorandum or Law in opposition to the Plaintiff, Spectacor Management Group's ("SMG" or the "Company") Cross-Motion for Summary Judgment on the Counterclaim which is little more than a re-hash of the arguments raised in

his initial Motion for Summary Judgment. Because SMG believes that each of Mr. Brown's arguments has been addressed fully in its principal Memorandum, it will not repeat those arguments here, but will offer several brief observations upon the points raised by Mr. Brown.

Mr. Brown has also filed a Motion for Sanctions under Rule 11, alleging, in sum, that SMG "fabricated" its claim against him and filed a "strike suit" in retaliation for his having threatened to sue SMG (a suit which, he contends, exposed

* * *

D. Mr. Brown's Demand for Judgment on His claim for Vacation Pay and the "Financial Component" Bonus, as well as His Motion to Dismiss the Complaint as a Rule 11 Sanction, are Without Merit.

Lest there be any misunderstanding, SMG agrees that, under its policies as applicable to Mr. Brown, he has been credited with a gross sum of $15,692.00 in unused vacation and $50,000 in 1991 bonus under the Executive Annual Incentive Plan. These monies are, simply put, assets of Mr. Brown in the possession of SMG; SMG has not asserted that it'"owns" them or has acquired title to them in satisfaction of its claim against Mr. Brown. On the other hand, Mr. Brown is holding in excess of $50,000 in severance and other advances made to him by SMG and to which SMG makes a claim of right to reimbursement. How these claims (together with the various other raised by Mr. Brown) will "net out" at

the conclusion of this litigation is, obviously, a question which must abide the conclusion of the litigation.[4] Thus, this entire controversy strikes SMG as much ado about nothing.

The same is true of Mr. Brown's extraordinary Rule 11 Motion. There is no question but that, by September 1993, several months of negotiations between the parties had failed to produce an agreement and, based upon the salary continuation and other advances made on his behalf against an anticipated settlement, SMG had a claim against Mr. Brown, a person of diverse citizenship, in an amount in excess of $50,000 (while, of course, Mr. Brown denies that such payments were advances subject to recoupment, that denial is simply that and does not deprive SMG of a good faith basis for its claim). Assuming no other disputes between the parties, SMG could properly have brought that claim in this Court under its diversity jurisdiction. 29 U.S.C. § 1332(a).

Against this background, Mr. Brown's new counsel, Gary Green, Esquire, wrote directly to SMG's President, in a letter which began:

"Please be advised that this law firm

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[4] Indeed, even if Mr. Brown is, in theory, entitled to a ,'judgment" against SMG over these undisputed amounts, it is clear that, being inextricably bound up with all of the other claims and defenses of the parties, such a judgment would not be "final" under Rule 54 and Mr. Brown would not be entitled to payment of or to execute upon it unless this Court were to grant him certification under Rule 54(b) (something for which he has not even asked, much less demonstrated his entitlement).

> has been retained to institute proceedings against Spectacor Management Group ("SMG") on behalf of our client, Matthew G. Brown."

(Letter dated 9/20/93 from Green to Gibson, ¶ 1) (emphasis added).[5] The letter goes on to demand the sum of $1,153,145 and to opine that:

> "We harbor no illusion that this matter is likely to be settled outside the courtroom. Indeed, the correspondence between Mr. Roscetti [Brown's previous counsel] and Fox, Rothschild leads me to believe that you have misinterpreted what is at risk here for SMG, and that you have not assessed properly the evidence that is extant concerning Mr. Brown's entitlement to the sales commission relative to the Long Beach transaction."

(Letter dated 9/20/93 from Green to Gibson, ¶ 3)(emphasis added).[6] Agreeing with Mr. Green that it was unlikely that

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[5] A true and correct copy of Mr. Green's letter is contained in the Appendix to SMG's principal Memorandum as Exhibit "D".

[6] While SMG would normally have let such conduct pass as unworthy of comment, since Mr. Brown has raised the issue of professional propriety, one is led to wonder what Mr. Green was doing writing directly to the client and suggesting that the client and its counsel -- who, as reflected in the letter itself, Mr. Green knows

the matter would be settled "outside the courtroom" if his client was adhering to the position outlined in his letter and taking Mr. Green at his word that he was prepared to institute litigation himself if SMG did not capitulate in two weeks' time, SMG filed this action seeking the return of its advances to Mr. Brown.

Apparently, it is Mr. Brown's view that the existence of diversity jurisdiction is clearly negated and SMG's invocation of it is in such bad faith as to warrant the sanction of dismissal because independent of this claim, SMG also had in its possession monies belonging to Mr. Brown arguably sufficient to satisfy its claim if upheld. Mr. Brown then goes on to complain that this bad faith invocation of the Court's diversity jurisdiction had the pernicious effect of requiring him to bring his own claims as Rule 13(a) compulsory counterclaims. Not surprisingly, despite his citation of a volume of cases dealing with Rule 11 sanctions generally, Mr. Brown offers not a single authority which even suggests this to be the case. Rather, both the law and simple common sense compel the conclusion that Mr. Brown's contentions fail for several reasons.

First, the existence of a claim is not affected by the presence or absence of a source of funds for its satisfaction. SMG does not contend that it has "paid itself" what Mr.

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to be involved -- "have misinterpreted what is at risk here for SMG", if not attempting to "go behind counsel's back" and argue the merits of the case with the lay client. Not only does such conduct reflect extremely bad manners, it constitutes a flagrant violation of Rule 4.2 of the Rules of Professional Conduct.

Brown owes it by keeping his vacation pay and bonus monies; rather, it acknowledges that he disputes SMG's claim, continues to hold his funds in his name and intends to "execute" upon them only to satisfy a judgment when its claim is upheld. Put another way, SMG acted responsibly by promptly seeking judicial resolution of its claim (and, therefore, of Mr. Brown's entitlement to the money) rather than simply keeping it and "daring" Mr. Brown to file suit for its return. As reflected, among other places, in the Pennsylvania Wage Payment & Collection Law, 43 P.S. 260.9a(c),[7] an employer's retention of sums owing a departed employee in the amount of a "good faith setoff" or claims against the employee by the employer is well-established in both law and practice and cannot be said then to deprive the employer of otherwise available jurisdiction to have the underlying dispute judicially resolved.

Second, even to the extent that the theoretical "set-off" somehow affects the amount in controversy for a direct claim by SMG against Mr. Brown under Section 1332(a), there clearly was a dispute between parties of diverse citizenship in

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[7] This section of the law reads in relevant part:

> "A good faith dispute or contest as to the amount of wages due or the good faith assertion of a right of set-off or counter-claim shall be deemed a satisfactory explanation for nonpayment of such amount in dispute or claimed as a set-off or counter-claim."

43 P.S. § 260.9a(c).

which more than $50,000 was at issue sufficient to have permitted SMG to bring a Declaratory Judgment Action under Section 2201(a) of the Judicial Code, seeking a determination of the rights of the parties to (a) the advances and (b) the vacation pay and bonus monies being held. 28 U.S.C. § 2201(a). Indeed, the entire point of the Declaratory Judgment Act is to permit a party faced with acclaim to obtain an adjudication of its rights without being required to act at its peril and "wait to get sued". 6A Moore's Federal Practice § 57.23 & n.11 (2d ed. 1994) (citing Weyerhaeuser Corp. v. International Brotherhood of Pulp, Sulphite & Paper Workers, 190 F. Supp. 196 (D. Me. 1960). Regardless of the posture, Mr. Brown would still have been required by Rule 13(a) to assert his counterclaims, 6A Moore's Federal Practice § 57.27, and we would still be here.

Third, and perhaps most directly to the point, in Mr. Green's September 20, 1993 letter, he asserted on Mr. Brown's behalf all of what are now his counterclaims, in an amount in excess of $1,000,000, and threatened to sue upon them within two weeks. Manifestly, SMG could then have filed a Declaratory Judgment Action on all of these claims and obviated even the claim/counterclaim process. Once again, we would still be here.

Fourth, although he tries to do so in two different ways, Mr. Brown has demonstrated absolutely no prejudice resulting from SMG having sued first. Initially, Mr. Brown contends that he has been prejudiced because, but for the filing of the action, settlement negotiations would have continued without the pressure of litigation (Brown Motion at 26, n.9). The problem of course, is that this claim is belied by

Mr. Green's own letter to Mr. Gibson, which prompted SMG to file this action in the first place, in which he specifically says that he has been hired to litigate and that he "harbor[s] no illusion" that the matter can be settled without litigation.

Beyond that, what really appears to have Mr. Brown so exercised is the fact that, SMG having "beaten him to the punch" with its claim, Rule 13(a) required him to bring his own claims against SMG as compulsory counterclaims in this action, rather than in a separate action in state court (Brown Motion at 26, n.9). In an attempt at a degree of candor apparently foreign to Mr. Brown, SMG acknowledges that (a) the "conventional wisdom" -- as reliable as we all know it to be -- would normally suggest that the Philadelphia Court of Common Pleas is a more favorable forum for an employee in a financial dispute with his employer; (b) it would prefer to be in this Court (c) it was aware, when it filed its Complaint, of the operation of Rule 13(a) and (d) it was aware at the same time that, had Mr. Brown sued first in state court, SMG, as a resident defendant, would not have been able to remove the case despite diversity of citizenship and adequate amount in controversy. 28 U.S.C. § 1441(b). Meaning thereby no impertinence, SMG's only observation on these facts is "So What"? It was Mr. Brown who threatened imminent litigation, SMG perceived an advantage offered by the Rules and took advantage of it. This action reflected neither harassment nor bad faith, but rather simply good lawyering.

In sum, if Mr. Brown would like SMG to amend its Complaint to bring a Declaratory Judgment Action as to all of his claims, SMG fails to see the point but is prepared to do so. Beyond that, the Motion for Sanctions is without merit.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SPECTACOR MANAGEMENT GROUP,
Plaintiff,

v.

MATTHEW G. BROWN,
Defendant

CIVIL ACTION
NO. 93-5246

ORDER

AND NOW, this 13th day of February, 1995, the pending motions are disposed of as follows:

1. Plaintiff's and Defendant's Motions for Summary Judgment are DENIED.*

2. Defendant's Motion for Sanctions is DENIED.**

BY THE COURT:

/s/_____
Robert S. Gawthrop, III, J

*The deposition testimony offered by defendant does not establish that Mr. Tavares made an oral contract with plaintiff to provide him with the severance pay, commission and benefits to which he claims to be entitled. On the other hand, the testimony does not establish conclusively that no oral contract was made.

**The record before me does not establish that plaintiff filed this diversity action in bad faith. Sums owed by a plaintiff to the defendant are not subtracted from the amount of plaintiff's claim when calculating the jurisdictional amount. See, e.g., Savarese v. Edrick Transfer & Storage, Inc., 513 F.2d 140, 142 (9th Cir. 1975). Thus, the fact that plaintiff held a certain amount of wages it owed to defendant as a "setoff" does not bar plaintiff from filing a claim against defendant, in particular when defendant has threatened to file a lawsuit of his own against plaintiff. Plaintiff admits that it does not "own" the setoff funds, and it plans to claim those funds only to satisfy a judgment in its favor.

Further, plaintiff did not file this action solely to harass defendant. When defendant threatened to file a lawsuit against plaintiff, plaintiff filed the instant lawsuit in order to obtain what it perceives to be the more amenable forum. So long as plaintiff has a factual and legal basis for filing suit in this court, its strategic action is not sanctionable.

APPENDIX M

* * *

give us the components?

A. The total is approximately $50,700, and it is comprised of compensation in the amount of $42,500, employer payroll taxes associated with that in the amount of $3300, and medical benefits, of approximately 4900.

MR. SILVERSTEIN: Thank you. No other questions.

CROSS-EXAMINATION

BY MR. GREEN:

Q. The calculation of how much money SMG paid itself from the bonus, that it paid to Mr. Brown--

MR. SILVERSTEIN: Your Honor, if I may, this is beyond the scope of the direct. The issue of the bonus is part of counterclaimant's case. Mr. Burns will be available. I purposely narrowed it so if we were going to get into this on cross examination, I would have dealt with these issues on my direct. That was the purpose of my separating these things out, so we could very simply and narrowly limit Mr. Burns' testimony here. He will be available. If Mr. Green wishes to

call him on his case-in-chief, I will make a representation that we will make Mr. Burns available without need for subpoena. But this is exactly the reason, to avoid this now, that I didn't go into this

J. Burns - Cross

[76]

direct with Mr. Burns.

THE COURT: Does that not sate your concerns, sir?

MR. GREEN: Your Honor, if Mr. Burns is here to testify that there was an amount paid, to establish what the claim is, if Mr. Burns should also say, what amount they took at the time they are making the payment, because there's already an acknowledgment--

THE COURT: Can't you explore that later in the case, figuratively speaking?

MR. SILVERSTEIN: I do not believe there is any dispute as to the setoff amount.

THE COURT: I don't think so either.

MR. GREEN: May I mention this one point, why I want to bring it in now? I will obviously abide by the Court's ruling.

THE COURT: It can come in, if you want to get into that, at the end of plaintiff's case.

MR. GREEN: We would like to make a motion under

Rule 52(c), at which time I would like to be able to argue to the Court that based on all of the hearing evidence on the plaintiff's side, they have not established any damages were due, and since this witness, with only being half of the bagel, so-to-speak, testifying what the amount was that they

J. Burns - Cross

[77]

spent for Mr. Brown, we should also know what the other side was, what was the amount they credited to themselves, so the net may work out to be either zero, not making plaintiff's claim for that reason alone.

MR. SILVERSTEIN: We are willing to stipulate to that amount. I believe the Court can take judicial notice as admission in the prior filings that we filed with respect to the various motions. Mr. Green wants to present me with a figure.

THE COURT: Upon that warranty, let's do it that way.

MR. GREEN: Okay.

MR. SILVERSTEIN: I believe I can stipulate that the amount, the total amount of the bonus and the vacation pay exceeds the amount that we paid off, paid out.

MR. GREEN: I will accept that. I have just one or two other questions.

BY MR. GREEN:

Q. Mr. Burns, did they reserve -- let me preface that, that was a terrible question.

Did SMG reserve a sum for Mr. Brown's payment?

A. What do you mean by reserve?

Q. Put $200,000 in reserve to pay Mr. Brown?

* * *

Supreme Court, U.S.
FILED
MAR 13 1998
CLERK

NO. 97-1530

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

MATTHEW G. BROWN,
Petitioner,

v.

SPECTACOR MANAGEMENT GROUP,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

This is a simple, state law contract case which, despite Petitioner's selective and misstated references to the record and hyperbolic prose, does not merit review by this Court..

Matthew G. Brown, at all relevant times a citizen of New Jersey, is a former employee of Spectacor Management Group ("SMG"), a Pennsylvania joint venture (7a)[1]. Following the termination of his employment, SMG and Brown tried and failed to resolve various differences between them over severance benefits, bonuses, sales commissions and other issues. When Brown threatened suit, SMG sued first, seeking recovery of money it had advanced Brown and expenses it had incurred as a result of those advances, specifically including additional payroll tax liabilities, in a total amount of $50,708.25 (7a & 65a-66a). Brown answered this Complaint and asserted a compulsory counterclaim in the total amount of $1,060,665 (8a & 68a-77a).

Following discovery, both Brown and SMG moved for summary judgment. In addition, Brown filed a Rule 11 Motion, seeking sanctions against SMG for having forced him to bring his claims as compulsory counterclaims in federal court rather than waiting for him to file his own complaint in state court (from which, because SMG was a resident defendant, it would not have been removable). The basis for this latter motion was not that SMG had improperly counted its payroll tax liabilities in the

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[1]Citations styled "___a" refer to pages of the Appendix to the Petition for Writ of Certiorari.

amount in controversy, but rather the argument that certain undisputed sums owed Brown by SMG ought to be subtracted from the amount of SMG's claims against Brown in calculating the amount in controversy (110a-12a). The District Court denied all of these motions, the case was tried non-jury and the District Court found (a) in favor of SMG in the full amount of its $50,708.25 claim against Brown, (b) in favor of SMG on all of Brown's disputed contract claims and (c) in favor of Brown only as to those contract claims which SMG did not dispute (60a-61a). Brown appealed.

On appeal, the Third Circuit did not even grant oral argument on Brown's substantive claims or on his claim that the District Court lacked subject matter jurisdiction because the amount of Brown's undisputed claims had to be "netted" from the amount of SMG's claims in determining the amount in controversy. Rather, the Court of Appeals, on its own motion, raised, and called for oral argument, on the issue of whether SMG could properly include its enhanced payroll tax liabilities in the amount in controversy. Ultimately, the Court found it unnecessary to decide that issue, holding that, because it arose out of the same transaction or occurrence as SMG's claim, the amount of Brown's compulsory counterclaim constitutes part of the "amount in controversy" and, because Brown had asserted that counterclaim without first moving to dismiss for lack of subject matter jurisdiction, there was no unfairness in permitting it to be considered for jurisdictional purposes (8a-9a). While Senior Circuit Judge

Wellford, visiting from the Sixth Circuit, dissented, no active Circuit Judge of the Third Circuit voted for rehearing en banc (1a).

Brown now seeks discretionary review in this Court.

REASON FOR DENYING THE WRIT

A. The Decision of the Court of Appeals is Consistent in all Respects with the Prior Decisions of this Court and with the Decisions of the Other Courts of Appeal Which have Considered the Same Question and Raises no Issue of Substantial Importance to Federal Jurisdiction

This is a simple case in which neither the District Court nor the Court of Appeals did anything improper nor, for that matter, even unique. None of the considerations governing review on certiorari is present. Sup. Ct. R. 10.

1. The Decision of the Court of Appeals is Consistent With Section 1332(a) and the Prior Decisions of this Court.

While the Petition is somewhat difficult to parse, Brown's first argument appears to be that, in light of this Court's decision in St. Paul Mercury Indemnity Co. v. Red Cab. Co., 303 U.S. 283, 288-90 (1938), there are no circumstances under which a compulsory counterclaim may be considered in determining the amount in controversy for diversity jurisdiction purposes (Petition at 13-16). Neither the diversity jurisdiction statute, 28 U.S.C. § 1332(a), nor St. Paul says any such thing, either explicitly or by fair inference, and another decision of this Court at least suggests the contrary. Horton v. Liberty Mutual Insurance Co., 367 U.S. 348 (1961).

At the same time, two courts of appeals in addition to the Third Circuit have held squarely that compulsory counterclaims can be considered in determining the amount in controversy. Fenton v. Freedman, 748 F.2d 1358, 1359 (9th Cir. 1984); Motorists Mutual Insurance Co. v.

Simpson, 404 F.2d 511, 514 (7th Cir. 1969); Roberts Mining Co. v. Schrader, 95 F.2d 522, 523-24 (9th Cir. 1938).

Brown's rhetoric to the contrary notwithstanding, this is not a case of parties attempting to "confer subject matter jurisdiction by agreement". Under Section 1332(a), diversity jurisdiction exists where the "amount in controversy" is sufficient. 28 U.S.C. § 1332(a). Whether or not the portion of the controversy raised by the Plaintiff meets that threshold, by definition, claims which must be asserted as compulsory counterclaims under Rule 13 arise out of the same "controversy", Moore v. New York Cotton Exchange, 270 U.S. 593, 609-10 (1926); Fed. R. Civ. P. 13(a), and, analytically, nothing on the face of the statute precludes their inclusion in the jurisdictional amount once they are in the case. Once the counterclaim is asserted, there is no statutory reason why, and no suggestion in St. Paul that, it cannot provide the basis for diversity jurisdiction.[2]

In sum, this case does not present a conflict with any prior decision of this Court.

2. The Decision of the Court of Appeals is Consistent With the Decisions of the Other Courts of Appeals.

Having first apparently argued that Fenton, Simpson and Roberts were wrongly decided in light of St. Paul, Brown then goes on to embrace

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[2]What Brown also continues to ignore is that the District court found as a fact that SMG's claim against him exceeded $50,000, he has yet to point to a single case holding that SMG cannot recover it payroll tax liabilities (much less that its attempt to do so was in bad faith) and the Court of Appeals never reached this issue.

those decisions and argue that the Third Circuit's decision here is in conflict with them and that certiorari should be granted to resolve that conflict (Petition at 18-21). The basis for this purported conflict is Brown's contention that Fenton, Simpson and Roberts turned on the fact that the defendants there had filed their counterclaims without first objecting to jurisdiction while Brown raised lack of jurisdiction in his answer at the same time that he asserted his counterclaim. Brown misses the point. The essential distinguishing factor in Fenton, Simpson and Roberts was whether the defendant filed a Rule 12(b) motion challenging jurisdiction prior to asserting the counterclaim upon which jurisdiction could independently rest and not whether such a jurisdictional challenge had been made in the answer or otherwise. Nothing in Fenton, Simpson and Roberts, suggests that either the Seventh or Ninth Circuits would have reached a different result on the facts of the present case.

The Third Circuit's decision is not contrary to the decisions of the other courts of appeals and a grant of certiorari is not necessary to resolve any split in the circuits.

3. The Decision of the Court of Appeals is Consistent with the Federal Rules of Civil Procedure.

Finally, Brown argues that, insofar as it distinguished between challenging jurisdiction by way of a motion to dismiss and by way of affirmative defense in an answer, the Third Circuit has somehow violated Rule 12 of the Federal Rules of Civil Procedure, which he contends equates the two procedures (Petition at 16-18). Again, he simply misses

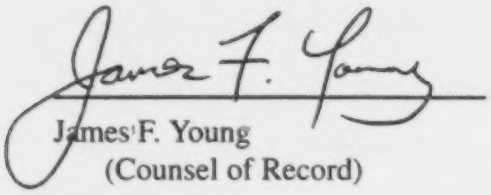
the point.

Certainly, Brown is correct when he says that Rule 12 permits various defenses, including both lack of subject matter jurisdiction or failure to state a claim upon which relief can be granted, to be raised either by motion or by answer. Fed. R. Civ. P. 12. His error is in assuming the next step: That, regardless of when or how raised, the substantive result must be the same. Simple common sense tells us that is not so.

For example, if claimed federal question jurisdiction proves deficient, the question of whether the district court would then continue to exercise supplemental jurisdiction over state law claims in the same Complaint may be answered very differently depending upon the stage of the case and the resources invested to that point. See generally Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350 n.7 (1988); Rosado v. Wyman, 397 U.S. 397, 404-05 (1970). The fact that the federal rules provide more than one route to the same objective neither guarantees that each route will be equally successful nor frees counsel from the obligation to understand the potential consequences of his or her choice among these routes. Brown could have moved to dismiss and filed his own claims in state court. He elected not to do so. Rather, he chose to answer, assert his counterclaims, raise a jurisdictional defense in that answer and forego further litigation of the jurisdictional issue at that time. The Federal Rules of Civil Procedure do not protect parties from the consequences of their tactical decisions.

CONCLUSION

The questions presented in the Petition for Writ of Certiorari are both insubstantial and without merit. None of the considerations governing review by certiorari is present. The Petition should be denied.



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